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PENNSYLVANIA c

STATE REPORTS.

VOL. 272

CONTAINING

CASES DECIDED

BY THE

Supreme Court of Pennsylvania,

January Term, 1922

REPORTED BY

0 ALBERT B. WEIMER,

STATE REPORTER.

GEO. T. BISEL CO.,
PHILADELPHIA,
1922.

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**By BERNARD J. MYERS, SECRETARY OF THE COMMONWEALTH,
For the State of Pennsylvania.**

AUG 28 1922

JUSTICES
OF THE
SUPREME COURT OF PENNSYLVANIA
DURING THE PERIOD OF THESE REPORTS.

Chief Justice, . . . ROBERT VON MOSCHZISKE.
Justice, . . . ROBERT S. FRAZER.
Justice, . . . EMORY A. WALLING.
Justice, . . . ALEX. SIMPSON, JR.
Justice, . . . JOHN W. KEPHART.
Justice, . . . SYLVESTER B. SADLER.
Justice, . . . WILLIAM I. SCHAFER.

ATTORNEY GENERAL,
MR. GEORGE E. ALTER.

JUDGES
OF THE
SUPERIOR COURT OF PENNSYLVANIA
DURING THE PERIOD OF THESE REPORTS.

President Judge, ... **GEORGE B. ORLADY.**
Judge, ... **WILLIAM D. PORTER.**
Judge, ... **JOHN J. HENDERSON.**
Judge, ... **JOHN B. HEAD.**
Judge, ... **FRANK M. TREXLER.**
Judge, ... **WILLIAM H. KELLER.**
Judge, ... **WILLIAM B. LINN.**

JUDGES OF THE COURTS BELOW

DURING THE PERIOD OF THESE REPORTS.

DIST.

1st—Philadelphia County.

Courts of Common Pleas.

*No. 1: F. AMEDEE BREGY, P. J.; JOHN M. PATTERSON and WILLIAM H. SHOEMAKER, JJ.

No. 2: NORRIS S. BARRATT, P. J.; JOSEPH P. ROGERS and HORACE STERN, JJ.

No. 3: CHARLES B. McMICHAEL, P. J.; WILLIAM O. FERGUSON and HOWARD A. DAVIS, JJ.

No. 4: CHARLES Y. AUDENRIED, P. J.; THOMAS D. FINLETTER and JOSEPH P. McCULLEN, JJ.

No. 5: J. WILLIS MARTIN, P. J.; WILLIAM H. STAAKE and JOHN MONAGHAN, JJ.

Orphans' Court.

JOSEPH F. LAMORELLE, P. J.; CHARLES FRANCIS GUMMEY, JOHN M. GEST, GEORGE HENDERSON and HENRY O. THOMPSON, JR., JJ.

The Municipal Court.

CHARLES L. BROWN, P. J., CHARLES E. BARTLETT, EUGENE C. BONNIWELL, H. GILBERT CASSIDY, UTLEY E. CRANE, JAMES E. GORMAN, WILLIAM GRAY KNOWLES, RAYMOND MACNEILLE, THOMAS F. McNICHOL, JJ.; JOHN E. WALSH from first Monday January, 1922.

2d—Lancaster County.

Court of Common Pleas.

CHARLES I. LANDIS, P. J.; AARON B. HASSLER, J.

Orphans' Court.

EUGENE G. SMITH, P. J.

2d—Northampton County.

RUSSELL C. STEWART, P. J.; WILLIAM M. McKEEN, J.; JAMES T. WOODRING from first Monday January, 1922.

4th—Tioga County.

SEVELLON F. CHANNELL, P. J.

*F. AMEDEE BREGY, P. J., died January 15, 1922; JOHN M. PATTERSON, P. J., from January 16, 1922.

5th—Allegheny County.*Court of Common Pleas.*

JOHN D. SHAVER, P. J.; JOHN A. EVANS, MARSHALL BROWN, until first Monday Jan., 1922, term expired; JAMES R. MACFARLANE, THOMAS J. FORD, JOSEPH M. SWEARINGEN, THOMAS D. CARNAHAN, JOSIAH COHEN, JOHN C. HAYMAKER, AMBROSE B. REID, J. MOF. CARPENTER, CHARLES H. KLINE, STEPHEN STONE and JAMES B. DREW, JJ.; HOWARD W. DOUGLASS from first M. January, 1922.

Orphans' Court.

J. J. MILLER, P. J.; THOMAS P. TREMBLE and H. WALTON MITCHELL, JJ.

County Court.

RICHARD A. KENNEDY, P. J.; CHARLES F. MCKENNA, D. M. MILLER, D. PAULSON FOSTER, THOMAS O. JONES and SYLVESTER J. SNEE, JJ.

6th—Erie County.

URIAH P. ROSSITER, P. J.; WILLIAM E. HERT, J.

Orphans' Court.

HENRY A. CLARK, P. J.

7th—Bucks County.

WILLIAM C. RYAN, P. J.

8th—Northumberland County.

HERBERT W. CUMMINGS, P. J., until first M. Jan., 1922; FRED B. MOSER, J.; FRANK H. STROUSS from first Monday Jan., 1922; ALBERT LLOYD from first Monday Jan., 1922.

9th—Cumberland County.

FILLMORE MAUST, P. J., until first Monday Jan., 1922; EDWARD M. BIDDLE, JR., from first Monday Jan., 1922.

10th—Westmoreland County.

CHARLES D. COPELAND, P. J.; CHARLES E. WHITTEN, J.; WILLIAM T. DOM, JR., from Jan. 12, 1922.

Orphans' Court.

JAMES S. BEACOM, P. J., until first Monday Jan., 1922; DANIEL S. SNYDER from first Monday Jan., 1922.

11th—Luzerne County.*Court of Common Pleas.*

HENRY A. FULLER, P. J.; JOHN M. GARMAN, S. J. STRAUSS until first Monday Jan., 1922; P. A. O'BOYLE until first Monday Jan., 1922, and J. B. WOODWARD, JJ.; WM. S. MCLEAN, JR., from first Monday Jan., 1922; BENJAMIN R. JONES from first Monday Jan., 1922.

Orphans' Court.

ANDREW M. FREAS, P. J., until first Monday Jan., 1922; E. FOSTER HELLER from first Monday Jan., 1922.

12th—Dauphin County.

WILLIAM M. HARGEST, P. J.; FRANK B. WICKERSHAM and JOHN E. FOX, JJ.

13th—Greene County.

J. W. RAY, P. J.

14th—Fayette County.

JOHN Q. VAN SWEARINGEN, P. J.; EDMUND H. REPERT, J.

Orphans' Court.

JAMES O. WORK, P. J.

15th—Chester County.

WILLIAM BUTLER, JR., P. J.; J. FRANK E. HAUSE, J.

16th—Somerset County.

JOHN A. BERKEY, P. J.

17th—Union County and Snyder County.

ALBERT W. JOHNSON, P. J., until first Monday Jan. 1922;

MILES I. POTTER from first Monday Jan., 1922.

18th—Clarion County.

G. G. SLOAN, P. J.

19th—York County.

NEVIN M. WANNER, P. J.; N. SARGENT ROSS, J.

20th—Huntingdon County, Mifflin County and Bedford County.

THOMAS F. BAILEY, P. J.

21st—Schuylkill County.*Court of Common Pleas.*

HARRY O. BROCHTEL, P. J.; RICHARD H. KOCH and CHARLES E. BERGER, JJ.

Orphans' Court.

MACHENRY WILHELM, P. J.

22d—Wayne County.

ALONZO T. SEARLE, P. J.

23—Berks County.*Court of Common Pleas.*

GUSTAV A. ENDLICH, P. J.; GEO. W. WAGNER, J.

Orphans' Court.

HARRY D. SCHAEFFER, P. J.

24th—Blair County.

THOMAS J. BALDRIGE, P. J.

25th—Clinton County, Cameron County and Elk County.

ROBERT B. McCORMICK, P. J., died Oct. 23, 1921. EUGENE H. BAIRD, appointed Nov. 29, 1921.

26th—Columbia County and Montour County.

JOHN G. HARMAN, P. J.

27th—Washington County.

Court of Common Pleas.

JOHN ADD. MCILVAINE, P. J., retired first Monday Jan., 1922;

JAMES I. BROWNSON, P. J., from first Monday Jan., 1922.

Orphans' Court.

HALDAIN B. HUGHES, P. J.

28th—Venango County.

GEORGE S. CRISWELL, P. J.

29th—Lycoming County.

HARVEY W. WHITEHEAD, P. J.

30th—Crawford County.

THOMAS J. PRATHER, P. J.

31st—Lehigh County.

CLINTON A. GROMAN, P. J.; MILTON C. HENNINGER, J., died
Sept. 25, 1921. CLAUDE T. RENO, appointed Nov. 2, 1921.

32d—Delaware County.

Court of Common Pleas.

ISAAC JOHNSON, P. J.; WILLIAM B. BROOMALL, J.

Orphans' Court.

JOHN B. HANNUM, P. J.

33d—Armstrong County.

J. W. KING, P. J.

34th—Susquehanna County.

ANDREW B. SMITH, P. J.

35th—Mercer County.

JAMES A. McLAUGHRY, P. J.

36th—Beaver County.

GEORGE A. BALDWIN, P. J.; FRANK E. READER, J.

37th—Warren County and Forest County.

EDWARD S. LINDSEY, P. J., until first Monday Jan., 1922; D. U.
ARRIED from first Monday Jan., 1922.

38th—Montgomery County.

Court of Common Pleas.

AARON S. SWARTZ, P. J.; JOHN FABER MILLER, J.

Orphans' Court.

WILLIAM F. SOLLY, P. J.

39th—Franklin County.

W. RUSH GILLAN, P. J.

40th—Indiana County.

J. N. LANGHAM, P. J.

41st—Juniata County and Perry County.

JAMES M. BARNETT, P. J.

42d—Bradford County.

WILLIAM MAXWELL, P. J.

43d—Pike County and Monroe County.

SAMUEL E. SHULL, P. J.

44th—Wyoming County and Sullivan County.

CHARLES E. TERRY, P. J.

45th—Lackawanna County.

Court of Common Pleas.

HENRY M. EDWARDS, P. J.; EDWARD C. NEWCOMB and GEORGE
W. MAXEY, JJ.

Orphans' Court.

M. F. SANDO, P. J.

46th—Clearfield County.

SINGLETON BELL, P. J.

47th—Cambria County.

Court of Common Pleas.

MARLIN B. STEPHENS, P. J., until first M. Jan., 1922; JOHN E.
EVANS, P. J., from first Monday Jan., 1922; JOHN H. MC-
CANN from first Monday Jan., 1922.

Orphans' Court.

SAMUEL LEMMON REED, P. J.

48th—McKean County.

JOSEPH W. BOUTON, P. J.

49th—Centre County.

HENRY C. QUIGLEY, P. J.

50th—Butler County.

AARON E. REIBER, P. J.

51st—Adams County and Fulton County.

DONALD P. MCPHERSON, P. J.

52d—Lebanon County.

CHARLES V. HENRY, P. J.

53d—Lawrence County.

S. PLUMMER EMERY, P. J.

54th—Jefferson County.

CHARLES CORBET, P. J.

55th—Potter County.

ALBERT S. HECK, P. J.

56th—Carbon County.

LAIRD H. BARBER, P. J.

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CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA

Russell, Appellant, v. Farmers Mutual Fire Insurance Co.

Insurance—Fire insurance—Prohibition of other insurance—Estoppel—Waiver—Authority of agent.

1. Where an insurance company delivers a policy of fire insurance to the insured knowing of the existence of other insurance on the premises, the company waives a condition in the policy that, if there is other insurance, the policy shall be void; and this is so though no waiver is endorsed on the policy.

2. An agent of an insurance company who has authority or power to consent to additional insurance, and, at the time he writes and delivers a policy, has knowledge that the insured has other insurance on the same property, his knowledge binds the company, in the absence of fraud, and the company is estopped to claim the invalidity of the policy on such grounds, notwithstanding any provisions to the contrary.

3. Where a fire policy provides that it shall be void if the insured has other insurance, and the agent, with proper authority, delivers the policy with knowledge of other insurance on the same premises, such policy is a valid policy of insurance rendering void a previous policy in another company, which provided that "insuring in any other company will make insurance null and void in this."

Appeals—Practice—Agreement as to facts—Evidence—Printing testimony.

4. On appeal, it is proper and commendable practice for the parties to agree, if they so desire, that the facts necessary for the

determination of the case are contained in the opinion of the court below, and are correct; that questions raised below were not disposed of, because they became immaterial upon the decision of the point that was considered; that if the Supreme Court determines the decision of the lower court on the question considered is correct, the judgment shall be affirmed; that if the Supreme Court decides the contrary, the record shall be remitted for appropriate action; that certain testimony specifically referred to is printed in the appendix, and that the printing of the other testimony and exhibits in the case is dispensed with as being immaterial to the decision of the question involved in the appeal.

Argued September 30, 1921. Appeal, No. 53, Oct. T., 1921, by plaintiff, from order of C. P. Mercer Co., June T., 1916, No. 78, entering judgment for defendant n. o. v., in case of F. B. Russell v. Farmers Mutual Fire Ins. Co. Before MOSCHZISKER, C. J., FRAZER, WALLING, SIMPSON, KEPHART, SADLER and SCHAFFER, JJ. Affirmed.

Assumpsit on fire insurance policy. Before McLAUGHRY, P. J.

The opinion of the Supreme Court states the facts.

Verdict for plaintiff for \$2,002. Judgment for defendant n. o. v.

Error assigned, among others, was order, quoting it.

W. W. Moore, with him *J. W. Nelson*, for appellant.—The agent had no authority to waive the provision of the policy: *Mitchell v. Ins. Co.*, 51 Pa. 402; *Bard v. Ins. Co.*, 153 Pa. 257; *Hook v. Ins. Co.*, 160 Pa. 229; *Beddall v. Ins. Co.*, 28 Pa. Superior Ct. 600; *Hottner v. Ins. Co.*, 31 Pa. Superior Ct. 461.

W. C. Pettit, for appellee, cited: *Clymer Opera Co. v. Ins. Co.*, 238 Pa. 137; *Damms v. Ins. Co.*, 226 Pa. 358; *Caldwell v. Fire Assn.*, 177 Pa. 492; *Clymer Opera Co. v. Ins. Co.*, 50 Pa. Superior Ct. 639.

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OPINION BY MR. CHIEF JUSTICE MOSCHZISKEB, January 3, 1922:

Plaintiff sued to recover on a policy of fire insurance; at trial, the parties agreed that the jury should find the amount of loss and the court determine the question of legal liability. The loss was found to be \$2,002, but judgment was entered for defendant because, on the facts involved, it was not liable in law. Plaintiff has appealed.

The opinion of the trial tribunal so well states the case that we shall quote rather fully therefrom, substituting the word "defendant" for the name of that company where it is used by the court below: "Plaintiff, F. B. Russell, took out the policy of insurance in defendant company, July 12, 1914. May 8, 1915, he took out the following additional policies: Pennsylvania Fire Insurance Co., \$5,000; Delaware Underwriters, \$5,500; Liverpool, London and Globe Insurance Co., \$5,000. All of these policies cover the buildings and personal property on plaintiff's farm, including a barn. On the 13th of August, 1915, the barn was destroyed by fire. Defendant's policy contains the following clause: 'This company will not insure any property that is insured in any other company, and insuring in any other company will make insurance null and void in this.'

"Each of the three additional policies contains the following: 'This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy. . . . This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements and conditions as may be indorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be subject of

agreement hereon or added hereto, and, as to such provisions and conditions, no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.'

"It is evident that, from the 12th day of July, 1914, when defendant issued its policy of insurance to F. B. Russell, to May 8, 1915, when additional policies were taken out in other companies, the policy in suit was binding on defendant. If this insurance ceased to be binding on that date, it was because of the violation of that part of the contract of insurance, by the insured, which states that 'insuring in any other company will make insurance null and void.' Did plaintiff have other insurance after the 8th of May, 1915, when he took out the three policies, or was the contract of insurance in each of these policies defeated as soon as made because of conditions contained in [such] contracts. Each of these policies declared the insurance void if the insured had other contracts of insurance upon the same property, 'unless otherwise provided by agreement endorsed thereon or added thereto.'

"It is clear that plaintiff had a contract of insurance with defendant company [the policy in suit] at the time the contracts [with the other companies] were made: it is also clear that no written permit for other insurance was placed on any of the [latter] policies. From these uncontradicted facts it [might] seem that the plaintiff obtained no additional insurance on the 8th of May, 1915 [when he took out the three additional policies], because of the provisions or conditions in those contracts, and, therefore, there was no forfeiture of contract with defendant company. But [to meet this position], it is claimed by defendant company that the Pennsylvania Fire Insurance Company, from which Mr.

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Russell secured the first additional policy, is estopped from setting up the lack of a written permit for other insurance on its policy because its policy was issued with knowledge that the insured had other insurance.

"It was admitted at the trial that S. T. Borland was the agent who countersigned, wrote and delivered the policy for the Pennsylvania Fire Insurance Company, and at the time the policy was issued plaintiff mentioned something about having insurance in defendant company or that he was going to drop it. From this admission we conclude that Mr. Borland, at the time this policy was issued, had knowledge of the insurance in the defendant company. Would this knowledge.....waive compliance with the provisions of the policy requiring a written indorsement? That the conditions in the policy may be waived there can be no doubt (Wood on Insurance, 2nd ed., p. 1162).....Where a policy of insurance reads that 'this entire policy unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy'; and the insurer delivers the policy to the insured knowing the existence of other insurance on the premises, the insurer waives the condition though no waiver is indorsed on the policy [citing and quoting from *Kalmutz v. Northern, etc., Ins. Co.*, 186 Pa. 571, 576; *Sitler v. Spring Garden, etc., Ins. Co.*, No. 2, 18 Pa. Superior Ct. 148, 152].

"When Mr. Borland testified plaintiff told him at the time the policy was issued 'that he either had insurance in the Delaware Mutual (a name commonly given to the defendant company) or that he was going to drop it,' this was notice to the Pennsylvania Fire Insurance Company that plaintiff had other insurance. If he said he 'had it' that would be direct and positive information. If he said he was 'going to drop it,' no other conclusion could be reached but that he had it at that time. The

agent could then have done one of two things, either refuse to write the policy or he could have placed in the policy the words 'other insurance permitted'; but he did neither. He delivered the policy to the insured, and received the premiums with knowledge that the insured had other insurance.....

"If an agent of an insurance company has authority or power to consent to additional insurance, and, at the time he writes and delivers a policy, has knowledge that the insured has other insurance on the same property, his knowledge binds the company, in the absence of fraud, and it is estopped to claim the invalidity of the policy on such grounds, notwithstanding any provisions of the policy in that regard (*Farmer's Mutual Ins. Co. v. Taylor*, 73 Pa. 342; *Mentz v. Ins. Co.*, 79 Pa. 475; *Kalmutz v. Ins. Co.*, 186 Pa. 571; and *Davis v. Ins. Co.*, 74 Pa. Superior Ct. 92); but there are Pennsylvania cases which may seem to have decided otherwise. How are these cases to be distinguished from others taking an opposite view? Where is the difference? Referring only to cases where the question of additional insurance is at issue, we think the difference is this: Where the agent has the power or authority to dispense with the conditions in the policy and to consent to additional insurance by indorsement, then his powers relate to the very subject out of which the estoppel arises, and knowledge to such an agent is knowledge to the principal [see cases last cited above]; but where the person charged with knowledge has no such power or authority, knowledge obtained by him is outside of the course of his employment and is not the knowledge of the insurer [citing, as cases in this class, *Mitchell v. Lycoming, etc., Ins. Co.*, 51 Pa. 402, 411; *Bard v. Penn Mutual, etc., Ins. Co.*, 153 Pa. 257, 262; *Hook v. Mutual Ins. Co.*, 160 Pa. 229, 231].

"We are of opinion that on the 8th of May, 1915, plaintiff took out valid insurance in the Pennsylvania Fire Insurance Company, and, therefore, at that moment the policy of defendant company became null and void."

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When the case came to us on appeal, the following agreement of counsel was placed on the record: "It is agreed that the facts necessary to the determination of this appeal are contained in the opinion of the court below, and that the facts as therein stated are correct. Questions were raised in the case which the court did not dispose of because they became immaterial upon the decision of the point that was considered in the opinion. It is agreed that, if the Supreme Court determines the decision of the lower court on the question considered is correct, the judgment shall be affirmed, and that, if the Supreme Court decides the lower court erred in the decision of the question considered, then the record shall be remitted to the lower court with directions to consider and decide the other question involved. It is also admitted that the only testimony in the case concerning the authority of Mr. Borland is the testimony of Mr. Borland which is printed herewith, and the policy of the Pennsylvania Fire Insurance Company, which was issued, countersigned and delivered by Mr. Borland to the plaintiff in this case, and the admission of the plaintiff that Mr. Borland had the right and authority to write in the policy the words, 'Other insurance permitted.' The printing of the other testimony and exhibits in the case is dispensed with as being immaterial to the decision of the question involved in this appeal."

The practice pursued, as shown by the above agreement, is commended, and called to the attention of the bar, in the hope that it may be employed more frequently.

The case was correctly determined and well disposed of by the court below; but, in addition to those already cited, we note the following relevant authorities: *Clymer Opera Co. v. Flood, etc., Ins. Co.*, 238 Pa. 137; *Caldwell v. Fire Association*, 177 Pa. 492; *Damms v. Humboldt Fire Ins. Co.*, 226 Pa. 358.

The judgment is affirmed.

Wood's Estate.

Executors and administrators—Trusts and trustees—Duties—Liabilities.

1. All that a court of equity requires from trustees is common skill, common prudence and common caution. Executors, administrators or guardians are not liable beyond what they actually receive, except in case of gross negligence or wilful default.

Decedents' estates—Counsel fees—Settling estate—Fees for services rendered prior to death—Evidence—Judicial notice.

2. The allowance for services of counsel in settling an estate is largely a matter for the court below.

3. An allowance of such fees by the court below will be approved, where it does not disclose an abuse of discretion, nor violate the rule that counsel fees can only be allowed for services beneficial to the estate, and not for such as were rendered for individual benefit.

4. The orphans' court, in settling an account of an executor, who was also decedent's attorney, commits error in allowing a claim for legal services rendered in decedent's lifetime, without any evidence being offered as to the value of such services.

5. In such case the court cannot take judicial notice of the value of the services.

Evidence—Witness—Competency of witness—Death.

6. Where an executor is first called as a witness, by one excepting to his account, and cross-examined at large as to matters occurring before and after the death of the testatrix, he is made competent for all purposes.

7. When he is recalled upon his own behalf, and no objection is made to his competency, his testimony is properly before the auditing judge, and exception thereto is without merit.

Argued October 3, 1921. Appeal, No. 55, Oct. T., 1921, by Mary Gregg, residuary devisee, from decree of O. C. Washington Co., May T., 1920, No. 89, dismissing exceptions to adjudication, in estate of Elizabeth Wood, deceased. Before MOSCHZISKER, C. J., FRAZER, WALLING, SIMPSON, KEPHART, SADLER and SCHAFER, JJ. Decree modified and affirmed.

1922.] Statement of Facts—Arguments.

Exceptions to adjudication. Before HUGHES, P. J.

The opinion of the Supreme Court states the facts.

Exceptions dismissed. Mary Gregg, residuary devisee, appealed.

Error assigned, among others, was decree, quoting it.

Harry S. McKinley, with him *J. P. Miller*, for appellant.—The accountant should be surcharged for the difference between the real value of the real estate sold by him and the price he obtained for the same: *Wilhelm v. Folmer*, 6 Pa. 296; *Penna. R. R. Co. v. Penna. Co. for Ins.*, etc., 205 Pa. 219; *Noble's Est.*, 178 Pa. 460; *Leslie's App.*, 63 Pa. 355; *Gilbert's App.*, 78 Pa. 266; *Semple's Est.*, 189 Pa. 385.

Accountant should have been surcharged for the amount allowed him by the auditing judge for professional services rendered decedent in her lifetime: *Heydrick's App.*, 109 Pa. 610; *Bickel's Est.*, 9 Pa. Dist. R. 129.

An executor who has been guilty of misconduct shall not be allowed commissions: *Clauser's Est.*, 84 Pa. 51; *McLeod's Est.*, 12 Phila. 81; *Milligan's App.*, 97 Pa. 525; *Schurr's Est.*, 13 Phila. 353; *Locher's Est. (No. 2)*, 219 Pa. 46; *Price's Est.*, 81 Pa. 263.

Under the facts and testimony, the attorney's fee of accountant's attorney should have been disallowed: *Pusey v. Clemson*, 9 S. & R. 204; *Wither's App.*, 13 Pa. 582; *Stephen's Est.*, 56 Pa. 409; *Clauser's Est.*, 85 Pa. 51; *Good's Est.*, 150 Pa. 307; *Glesenkamp's Est.*, 51 Pitts. L. J. 155; *Fox's App.*, 125 Pa. 518.

A. R. Witherspoon, of *Witherspoon & Devore*, with him *R. H. Meloy*, for appellee, cited: *Semple's Est.*, 189 Pa. 385; *Webb's Est.*, 165 Pa. 330; *Calhoun's Est.*, 6 Watts 185; *Moore's App.*, 10 Pa. 435.

OPINION BY MR. JUSTICE WALLING, January 3, 1922:

Elizabeth Wood, of Washington County, died testate on June 23, 1919, leaving an estate of about \$10,000, mostly in personalty. R. H. Meloy, Esq., of the Washington County Bar, had been acting as her attorney in fact and legal advisor for over three years. He looked after her property, transacted her legal business, including the drawing of her will, in which he was named executor and his compensation as such was fixed at \$500. Among the securities held by Mrs. Wood was a \$2,800 mortgage on a house and lot at Wilkinsburg, owned by Marie Orr, who rented the property through John L. Hoffman, a local real estate agent; but the net rent was not sufficient to pay the interest on the mortgage. Miss Orr, after some negotiations and shortly prior to the death of Mrs. Wood, turned over the property in consideration of the mortgage debt, the deed being taken in the name of Meloy, to avoid a possible merger, but in reality for Mrs. Wood. Meloy qualified as executor and, being in doubt as to the value of the Wilkinsburg property, caused the mortgage thereon to be appraised at \$2,000. During the summer and fall of 1919, he made an honest but unsuccessful effort to sell the property so as to realize the amount of the mortgage, but in December a Mrs. Thomas, through Hoffman, made an offer of \$2,400 and agent's commission for the house and lot, which Meloy in good faith and acting with reasonable prudence accepted, received \$100 hand money and entered into a written agreement for the sale of the property, and in the following March it was consummated by deed, payment of purchase money and satisfaction of the mortgage.

Mrs. Mary Gregg, the appellant, was the residuary legatee and devisee under Mrs. Wood's will; as such she came to Meloy in January, 1920, and objected to the consummation of the sale to Mrs. Thomas, expressing a desire to accept the Wilkinsburg property in kind. However, Mrs. Thomas declined to release her claim and ap-

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pellant took no legal steps to prevent the sale, so it was consummated. Meanwhile, at the instance of Mrs. Gregg, two real estate agents appraised the property at approximately \$4,000. The evidence indicates that soon after decedent's death appellant had some informal talk with the executor about taking this property, but he thought it might be necessary to make sale of it to secure sufficient funds to pay specific legacies, expenses, etc. The executor filed an account in which he charged himself, inter alia, with the \$400 received from Mrs. Thomas, in addition to the \$2,000 for which the mortgage had been inventoried. Among the exceptions filed by appellant was that accountant should be surcharged with the difference between her appraisal and what he received for the property. She further excepted to his claim of \$500 for services as executor, also to his claim of \$580 balance for legal services rendered decedent in her lifetime, and to his claim of \$200 paid A. R. Witherspoon, Esq., for legal services rendered the executor. The auditing judge reduced the accountant's claims for legal services rendered decedent to \$480 and the credit claimed for amount paid Mr. Witherspoon to \$150 and dismissed all other exceptions; and, from final decree entered by the court below in accordance therewith, exceptant brought this appeal.

While Meloy held title to the Wilkinsburg property in his own name, he did so in fact as trustee for decedent and as such charged himself with all he received therefrom. Exceptant took no legal steps to prevent the consummation of the sale, and, as held by the orphans' court, ratified it by proceeding to surcharge accountant with an alleged loss thereby sustained; hence, the power of Meloy to make the sale is not here involved; while the real question is, Was he therein guilty of such misconduct as to fasten upon him a personal liability? This must be answered in the negative. "All that a court of equity requires from trustees is common skill, common prudence and common caution. Executors, adminis-

trators or guardians are not liable beyond what they actually received unless in case of gross negligence, for when they act as others do with their own goods, in good faith, they are not liable": *Semple's Est.*, 189 Pa. 385; *Neff's App.*, 57 Pa. 96. Executors are not liable beyond what they actually receive except in case of gross negligence or wilful default: *Webb's Est.*, 165 Pa. 330. In passing upon the conduct of the trustee, we must do so upon conditions appearing when he entered into the contract of sale, including the facts that the property had been turned over to satisfy the \$2,800 mortgage, that accountant had inspected the premises, sought information as to its value and endeavored to obtain a higher price and finally accepted the \$2,400 net on the advice of the local agent. There is also the fact that the purchaser was a stranger to accountant, who realized no profit from the sale—not even a commission, as that was provided for in the will. He could not anticipate the boom in Wilksburg real estate, which started about the time he made the contract of sale and continued for some months thereafter; nor was he culpable in declining to repudiate his agreement with Mrs. Thomas, which might have subjected him to unpleasant and costly litigation. There is nothing in the evidence to justify a finding of negligence or bad faith on behalf of accountant in the sale in question and the exception thereto was properly dismissed by the orphans' court.

The \$500, claimed as executor's commission, was provided in the will, was less than five per cent of the estate and was properly allowed, as nothing appears to justify withholding compensation from accountant.

The allowance for services of counsel in settling an estate is largely a matter for the court below (*Com. v. T. & M. Bank of Pittsburgh*, 268 Pa. 526; *Traction M. Co. v. Pgh., M. & W. Ry. Co.*, No. 1, 261 Pa. 153, 161; *New York Trust Co. v. Pullman Mfg. Co.*, 237 Pa. 261), and the \$150 here approved for that purpose does not disclose an abuse of discretion, nor violate the rule that

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counsel fees can be allowed only for services beneficial to the estate and not for such as are rendered to the trustee for his individual benefit.

The allowance of \$480 to accountant, as a balance for legal services rendered the deceased in her lifetime, rests on different ground; as to that Meloy is merely a creditor of the estate, and, his claim being challenged by exceptant, the burden of proof is upon him: *Com. ex rel. v. Monongahela Val. Bank*, 239 Pa. 254; *Traction M. Co. v. Pgh., M. & W. Ry. Co.*, *supra*. What testimony there is on this question is that of Meloy and his stenographer in a very general way to the extent and nature of his services, and also a copy of his correspondence with and for decedent. There was no agreement as to compensation and no evidence as to the value of the services rendered, except what might be gathered from their general character. The learned president judge of the orphans' court, however, fixed their value on the ground that as a member of the profession he was competent to do so. No one doubts his competency, and, if it was a question of fixing the fees of counsel for services rendered in the settlement of an estate, or other matter under the eye of the court, his right so to do might be conceded. However, this is the ordinary claim of an attorney for services, in the nature of a quantum meruit, where he must prove what he did and its value (6 *Corpus Juris*, p. 759; *Allen v. Gregg* (Pa.), 16 *Atlantic Reporter* 46, 48); while he offered some evidence as to the former he offered none as to the latter; hence, the allowance of the claim was error. A recovery in the orphans' court as elsewhere must be founded upon evidence and, except in special cases as above mentioned, judicial notice cannot be taken of the value of an attorney's services: 16 *Cyc.* 858, section 12 and note 95. A court will only take judicial notice of a matter of common and general knowledge (15 *R. C. L.*, p. 1058) which the value of legal services is not. "A lawyer may bring suit for his fees, but his cause is to be tried like the causes of

other men": *Thompson v. Boyle*, 85 Pa. 477, 480. The opinion of those familiar with such services is the best evidence of their value (*Thompson v. Boyle*, *supra*) and cannot be disregarded by the court: *Moore's Est.* (No. 1), 228 Pa. 516, 522; *Com. v. T. & M. Bank of Pittsburgh*, *supra*.

At the audit, accountant was first called as a witness by exceptant and cross-examined at large as to matters occurring before and after the death of decedent; this made him a competent witness for all purposes and the court below properly so ruled. Moreover, when recalled in his own behalf, there was no objection made as to his competency; therefore, accountant's testimony was properly before the auditing judge and the belated exception taken thereto is without merit.

The \$480 credit, allowed accountant for legal services rendered by him to the decedent in her lifetime is stricken out, and, as thus modified, the decree is affirmed at the costs of the estate.

Fuher, Appellant, v. Westmoreland Coal Co.

Evidence—Contradiction of witness by physical facts—Case for jury—Mines and mining—Unlawful mining of coal—Statement of claim—Damages—Act of May 8, 1876, P. L. 142.

1. Where the apparent weight of the evidence on a disputed fact is overwhelming, still, if there is countervailing evidence of it upon which the jury may make a finding, all the evidence must be for their consideration.

2. Exceptions to this rule have been made in cases where testimony stands opposed to physical facts admitted, or the evidence thereof is of such conclusive and unimpeachable nature as to amount to an admission.

3. While an appellate court may not be authorized to weigh evidence and pass upon disputed facts, it should use its judicial knowledge to bring about justice, and, where undisputed physical facts are clearly shown and it is demonstrated by the law of nature, by mathematics or the like that a finding is untrue and cannot be true, the appellate court is justified in reversing the trial court.

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Syllabus—Arguments.

4. In an action to recover damages for the unlawful mining of coal, where the only evidence for plaintiff is that of one witness who testified that he crossed into plaintiff's land while mining coal for defendant, the case must go to the jury, although such testimony was in conflict with defendant's mine map.

5. Where, in an action to recover damages for unlawful mining of coal, the statement as a whole claims compensation for the coal taken and damages to the overlying surface, although it specifically claims double and treble damages under the Act of May 8, 1876, P. L. 142, the statement is sufficient upon which to ground the action for compensation.

Argued September 27, 1921. Appeal, No. 30, Oct. T., 1921, by plaintiff, from judgment of C. P. Westmoreland Co., May T., 1919, No. 457, on verdict for defendant, in case of W. L. Fuher v. Westmoreland Coal Co. Before MOSCHZISKE, C. J., FRAZER, WALLING, SIMPSON, KEPHART, SADLER and SCHAFFER, JJ. Reversed.

Trespass for unlawful mining of coal. Before McCONNELL, P. J.

The opinion of the Supreme Court states the facts.

Binding instruction for defendant. Plaintiff appealed.

Error assigned, inter alia, was above instruction, quoting it.

Charles C. Crowell, with him *Rabe F. Marsh*, for appellant.—Where a plaintiff's case depends on oral testimony, however clear and indisputable, it must be submitted to the jury: *Coyne v. Lackawanna Co.*, 53 Pa. Superior Ct. 603. See also, *Trexler v. Africa*, 33 Pa. Superior Ct. 395; *Horrell v. Reeves*, 72 Pa. Superior Ct. 129; *Phila. v. Ray*, 266 Pa. 345; *Harlow v. Boro.*, 194 Pa. 57; *Fry v. Glass Co.*, 219 Pa. 514; *Second Nat. Bank of Pittsburgh v. Hoffman*, 229 Pa. 429; *Kennelly v. Waropoyak*, 266 Pa. 94.

Paul H. Gaither, with him *R. Kay Portser* and *R. Kirk McConnell*, for appellee.

OPINION BY MR. JUSTICE KEPHART, January 3, 1922:

Appellant seeks to recover damages for the unlawful mining, removal and conversion of coal, and for subsidence of the surface. At the close of the case the court below gave binding instructions for defendant, stating: "It must be shown defendant took the coal. . . . If that has been shown it has been by the testimony of Frank Dugan, and by his testimony alone." This witness testified that, while mining coal for defendant, he crossed its line into the land of plaintiff, driving a coal entry nine feet wide to bench mark "X 42" on appellant's land. This, in substance, is the only competent evidence of any mining by appellee on appellant's premises. The court below disregarded this evidence because: (1st) it was in conflict with defendant's mine map, made under a law requiring certain records to be kept, showing the workings on its land, adjoining plaintiff's, confined wholly to its own land; (2d) Dugan's testimony, based on information from defendant's superintendent, was denied by the superintendent; (3d) plaintiff's engineer subsequently testified that if Dugan had run the entry straight it would have missed the bench mark by one hundred feet; and (4th), in conclusion, the only thing Dugan testified to was that coal would be found if the entry was extended beyond the limits of the Osborne tract down to the bench mark "X 42," and there were other means of discovering the trespass.

We have frequently said in cases where the apparent weight of the evidence on a disputed fact was overwhelming, still, if there was countervailing evidence of it upon which the jury might make a finding, all the evidence must be for their consideration. The jury had the undoubted right to weigh the evidence and pass on the credibility of the witnesses, where plaintiff's evidence, standing alone, would justify the inferences necessary

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to support his claim. When the trial court passes on the weight of the evidence, giving judgment therefrom, it substitutes the judge for the jury as the tryer of facts. If the jury's verdict is against the weight of the evidence a new trial should be granted, and, when manifestly so, as often as the court, in all conscience, should deem it necessary. Under our jurisprudence, this is the only corrective remedy for a perverse verdict.

Exceptions to this rule have been made in cases where testimony stands opposed to physical facts admitted or the evidence thereof is of such conclusive and unimpeachable nature as to amount to an admission. While an appellate court may not be authorized to weigh evidence and pass upon disputed facts, it should use its judicial knowledge to bring about justice, and, where undisputed physical facts are clearly shown and it is demonstrated by the law of nature, by mathematics or the like, that a finding is untrue and cannot be true, the appellate court is justified in reversing the trial court: *Lessig v. Reading Transit & Light Co.*, 270 Pa. 299, 302, 303; *Hill v. P. R. T.*, 271 Pa. 232. Appellee urges the evidence before us presents such situation.

Gill, appellant's engineer, on cross-examination, states that along the perimeter of the mine-workings as shown by all maps, in a distance of 870 feet (which practically included the outer edge of appellant's workings) there was standing 710 feet of solid coal, and, if the entry, described by Dugan as No. 2, was projected straight, as he testifies, it would miss these operations by one hundred feet. If this evidence was clear and undisputed, the physical fact that coal stood continuously solid for 710 feet would condemn Dugan's story,—it could not be true. But Gill does not go so far; in the 870 feet there were 160 feet of refuse or gob piled in the workings and located at different points along this perimeter. He could not get behind them and was not able to state whether the coal remained standing there or was worked out. He locates eight piles of gob at various points,

some close to the place Dugan said he had entered. Gill, in projecting entry No. 2 on defendant's map in the way he did, was merely following the direction of appellee's counsel. Entry No. 2 on defendant's land is not straight; it might be said to be generally in a straight line, but here Dugan's evidence is subjected to a rigid literal construction, not justified by the language used or the other evidence in the case. Gill further stated he did not know whether the workings under appellant's land, as shown by its map, were correct, and it is from that map the divergence was shown. Gill's assistant did not agree with him on all matters to which he testified.

Too much stress was placed on appellee's mine map. It may be entitled to great probative value, but that was for the jury; even if it is correct, the Act of July 15, 1897, P. L. 279, or possibly some other act, directed these mine maps to be made and filed as matters of record. As a general rule, where parties knowingly encroach on another's land in mining, they are not astute to uncover it by means of detailed maps; it would not be controlling in this case.

While defendant's evidence was very strong and persuasive, it should have been submitted to the jury; the court below can take care of the justice of the case later. While the suit as instituted claimed double and treble damages under the Act of May 8, 1876, P. L. 142, the statement as a whole claimed compensation for the coal taken and damages to the overlying surface. This was sufficient upon which to ground the present action. As to the latter items, there was no evidence to support them.

The judgment of the court below is reversed and a venire facias de novo awarded.

Lowry, Appellant, v. Atlantic Coal Co.

Mines and mining—Lease—Covenant running with land—Covenant as to assignments—Consent of owner—Personal covenant—Subsequent assignees—Res adjudicata.

1. The assignee of a lease is not bound by stipulations which arise from the contract made by another, but only from the liability arising from privity of estate.

2. Where the owner of coal, leases mining rights therein, on royalty for a term of years, and stipulates that the lessee shall not assign the lease without the written consent of the owner, such covenant is a personal one by the lessee, and where he assigns with the written consent of the owner, his assignee is not bound by the covenant, but may assign the lease without the owner's consent.

3. If the lessee so assigns the lease, the assignee becomes liable for the royalty, and the responsibility of the lessee ends.

4. Covenants to pay rent or royalty run with the land, and the assignee is bound by their terms, and this is so though the lease binds the original party and his assigns.

5. In such case it is immaterial that the assignee is of no financial worth, so long as it appears that the transfer was not merely colorable.

6. In a suit against a second assignee for royalty which had become due after the date of a third assignment, and after the third assignee had taken possession, a successful suit against the second assignee for royalties which had accrued in the previous year cannot be set up as *res adjudicata*. The cause of action was not the same in the two suits.

Argued September —, 1921. Appeal, No. 146, Oct. T., 1921, by plaintiff, from judgment of C. P. Somerset Co., Dec. T., 1920, No. 80, on verdict for defendant, in case of J. C. Lowry v. Atlantic Coal Co. Before MOSCH-ZISKER, C. J., FRAZER, WALLING, SIMPSON, SADLER and SCHAFFER, JJ. Affirmed.

Assumpsit for royalties. Before BERKEY, P. J.

The opinion of the Supreme Court states the facts.

Verdict and judgment for defendant. Plaintiff appealed.

Assignment of Error—Opinion of the Court. [272 Pa.

Error assigned, inter alia, was refusal of judgment for plaintiff n. o. v., quoting record.

J. C. Lowry, with him *Alexander King*, for appellant.—Taken in the light most favorable to the assignee, the covenants of the grant would have to be interpreted as covenants running with the estate, and whosoever acquired the estate took it with its limitations and subject to its obligations: *Provident L. & T. Co. v. Fiss*, 147 Pa. 232; *Carr v. Lowry*, 27 Pa. 257; *Horn v. Miller*, 136 Pa. 640.

Charles F. Uhl, of *Uhl & Ealy*, for appellee.—There is no question of res judicata: *Schwan v. Kelly*, 173 Pa. 65; *Penna. Laundry Co. v. Land. T. & T. Co.*, 74 Pa. Superior Ct. 329; *Morrison v. Beckey*, 6 Watts 349; *Williams v. Row*, 62 Pa. 118; *Schrivver v. Eckenrode*, 87 Pa. 213; *Cavanaugh v. Buehler*, 120 Pa. 441; *Jackson v. Thomson*, 215 Pa. 209.

The liability of defendant to plaintiff ceased on the assignment and transfer by defendant of all rights under the agreement in suit: *Negley v. Morgan*, 46 Pa. 281; *Washington Nat. Gas Co. v. Johnson*, 123 Pa. 576; *Watt v. Gas Co.*, 8 Pa. Superior Ct. 618; *Ahern v. Standard Realty Co.*, 267 Pa. 404.

OPINION BY MR. JUSTICE SADLER, January 3, 1922:

The appellant conveyed the mining rights for twenty-five years in a property owned by him in Somerset County. *Cochrane*, the lessee, agreed to pay a minimum royalty, and also not to sublet or transfer his contract without the written consent of *Lowry*. On October 31, 1916, his interest was assigned to one *Black*, who, on October 31, 1917, transferred it to the Atlantic Coal Company. In both instances the lessor concurred in writing, but in so doing made no provisions against subsequent transfers without his consent. On July 17, 1919, the annual royalty became due, and no payment having

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been made by the coal company because of an alleged surrender of the lease, as a result of a failure to find sufficient merchantable coal, suit was brought to recover the sum fixed. The verdict was in favor of the lessor, and an appeal subsequently taken was nonprossed.

Prior to the accrual of the next installment of royalty, an assignment of the lease was made to one Pritts, who took possession of the property, the coal company releasing all beneficial enjoyment therein. Lowry denied that this action passed any interest, claiming the transfer required his written consent, a provision which, as noted above, appeared in the original lease to Cochrane. It was insisted that this covenant was binding upon all subsequent assignees of the agreement, though not expressly so provided in the paragraph requiring such concurrence.

The present action of assumpsit was instituted to secure the rental due July 19, 1920, and the coal company was made the defendant. It was claimed that its liability became fixed by the proceeding of the previous year, and that the attempted assignment to Pritts, without leave of the lessor, was ineffective. Binding instructions were given for the defendant at the conclusion of the trial which followed, and, from the refusal to enter judgment n. o. v., the present appeal was taken.

The power of the second assignee to transfer to a third, without express approval by the lessor, is the first question for consideration. By the contract, the right to mine was granted to the party of the second part, his heirs or assigns, and the obligation to pay the minimum royalty by all such parties was set forth. The restriction as to future transfers, contained in paragraph five, was limited to the lessee, Cochrane. When he sold to Black, a written permission was given, but it included no limitation upon the right of the latter to assign, without concurrence. True, consent was likewise given when the coal company took possession, though it was not required; nor was it necessary when the transfer to Pritts

was made. The assignee of a lease is not bound by stipulations which appear in the contract made by another, but only by the liabilities arising from privity of estate: *Ahern v. Standard Realty Co.*, 267 Pa. 404; *Provident L. & Tr. Co. v. Fiss*, 147 Pa. 232. The covenant not to sublet without approval in writing was a personal one, by which of course *Cochrane*, the first lessee, was controlled. It did not, however, bind the subsequent assignees, since the lessor failed to provide in the first written consent that no additional transfer should be made without his leave: 16 R. C. L. 867; *Sanders v. Partridge*, 108 Mass. 556; *Reid v. Wiessner Brewing Co.*, 88 Md. 234, 40 Atl. 877; *Trickett on Landlord and Tenant*, 394. *Pritts*, therefore, by the act of the coal company, became possessed of such right to mine as the latter had acquired.

What was the effect of this transfer upon the liabilities of the respective parties to the lessor? It was made before July 17, 1920, when the annual royalty became due, and the possession of the land was surrendered by the assignor, and taken by *Pritts*. There is nothing to indicate that the transaction was merely a disguise by which the coal company retained the beneficial enjoyment, while placing the burden of payment upon its transferee. Covenants to pay rent or royalty run with the land, and the assignee is bound by their terms: *Fennell v. Guffy*, 139 Pa. 341; *Fennell v. Guffy*, 155 Pa. 38. This liability continues, however, only so long as does the privity of estate, and when the control of the land has been surrendered to another it ceases, in the absence of some contract to the contrary: *Negley v. Morgan*, 46 Pa. 281; *Borland's App.*, 66 Pa. 470. And this is so, though the lease binds the original contracting party and his assigns, as in the present case: *Washington N. Gas. Co. v. Johnson*, 123 Pa. 576. Having taken possession, the new assignee becomes liable, and the responsibility by the previous holder ends: *Hannen v. Ewalt*, 18 Pa. 9; *MacDonald v. O'Neil*, 21 Pa. Superior

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Ct. 364; Goss v. Woodland Fire Brick Co., 4 Pa. Superior Ct. 167; Acheson v. Kittanning C. N. Gas Co., 8 Pa. Superior Ct. 477. It is immaterial that he is of no financial worth, so long as it appears that the transfer is not merely colorable: Negley v. Morgan, *supra*; Goss v. Woodland Fire Brick Co., *supra*. It may be that Pritts is without means to pay, but it is to him the lessor must look, upon the breach of the covenant for rent. The liability of the present appellee was terminated, and, as to it, no recovery can be had.

It is insisted, however, that the whole question here is *res adjudicata*, and the liability of the coal company is no longer a matter of inquiry. In the suit of the previous year, as already noted, a recovery was had for the annual royalty due July 17, 1919, the defense being an alleged lack of mineable coal, resulting in a surrender of the lease; judgment was recovered for the plaintiff. Here, an entirely different situation is shown, to wit, an assignment of the lease before the rental has become due, and the taking possession of the land by the assignee. It is undoubtedly true that judgments are conclusive as to all relevant matters which were, or could have been, considered in the prior proceeding: First National Bank v. Dissinger, 266 Pa. 349; McGunnegle v. Railroad, 269 Pa. 404. In order, however, to render a judgment effectual as a bar, it must appear that the cause of action is the same in substance and can be sustained by the same evidence: Schwan v. Kelly, 173 Pa. 65; Nernst Lamp Co. v. Hill, 243 Pa. 448. Clearly, in the present case, a different contention is presented. At the time of the former trial the appellee had not made the assignment and given up possession,—facts upon which the present defense rests. The objection made cannot, therefore, be sustained.

The judgment of the court below is affirmed at the cost of the appellant.

**Berlin Smokeless Coal & Clay Co. et al., Appel-
lants, v. Rohm et al.**

*Judgment—Lease of coal lands—Assumption of judgment—
Fraud—Rescission of contract—Equity—Findings of fact.*

1. A bill in equity to have a judgment declared paid, is properly dismissed, where the evidence shows: that defendants had leased certain coal lands from plaintiffs, at the same time agreeing to protect the land against a judgment which was a lien thereon; that defendants had paid the judgment and taken an assignment thereof; that shortly afterwards defendants discovered that plaintiffs had made false representations as to the land and coal covered by the lease, whereupon they promptly rescinded the contract; and that the amount paid by the defendants on the judgment had never been returned to them.

2. The findings of fact of a chancellor will not be reversed on appeal, in the absence of manifest error.

*Equity—Equity practice—Amendment—Delay in application—
Discretion of court—Withdrawing bill.*

3. The allowance of amendments rests in the reasonable discretion of the court, and, in absence of plain error, its action will not be reversed.

4. The refusal to permit a bill in equity to be amended is amply justified after finding of facts and law had been made, and a decree nisi entered; and particularly is this so if circumstances appear which showed a failure to exercise due diligence in making the application.

5. One of the plaintiffs in an equity suit will not be permitted to withdraw his bill, after rulings adverse to his contention have been entered.

Argued September 29, 1921. Appeal, No. 181, Oct. T., 1921, by plaintiff, from decree of C. P. Somerset Co., No. 7, Equity, 1920, dismissing bill in equity, in case of Berlin Smokeless Coal & Clay Mining Co. et al. v. Bertha Rohm, Executrix of M. J. Rohm, deceased, and James C. Long. Before MOSCHZISKE, C. J., FRAZER, WALLING, SIMPSON, KEPHART, SADLER and SCHAFFER, JJ. Affirmed.

1922.] Statement of Facts—Opinion of the Court.

Bill in equity to declare judgment paid. Before
BERKEY, P. J.

The opinion of the Supreme Court states the facts.
Bill dismissed. Plaintiffs appealed.

Error assigned, among others, was decree, quoting it.

A. H. Bell, of *Bell & Bell*, *L. C. Colborn*, *F. A. Mil-*
lott and *Kooser & Kooser*, for appellant, cited, as to
rescission: *Miller v. Gilleland*, 19 Pa. 119.

As to amendment: *Bauschard v. Fidelity & Casualty*
Co., 21 Pa. Superior Ct. 370; *Austin Mfg. Co. v. Duerr*,
19 Pa. Superior Ct. 560; *Robbins v. Robinson*, 176 Pa.
341; *Wilhelm's App.*, 79 Pa. 134; *Clark v. Gas Co.*, 184
Pa. 188; *Cassell v. Cooke*, 8 S. & R. 296; *Coxe v. Tilgh-*
man, 1 Whart. 282; *Yohe v. Robertson*, 2 Whart. 155.

Chas. H. Ealy, of *Uhl & Ealy*, with him *Sterling, Hig-*
bee & Matthews, for appellee, cited: *Hooffstittler v. Hos-*
tetter, 172 Pa. 575; *Brotzman's App.*, 119 Pa. 645;
Howard v. Boro., 181 Pa. 191.

OPINION BY MR. JUSTICE SADLER, January 3, 1922:

Hillegass was the owner of certain coal rights which
he conveyed to the Berlin Smokeless Coal & Clay Min-
ing Company, of which he was president. This corpora-
tion became indebted to Valentine Hay, who, in 1916,
entered a judgment, confessed by the company, for
\$7,000, payable in installments, the first of which
amounted to \$2,235. As collateral security, Hillegass
and one Miller executed a note for a like amount, which
was likewise made a matter of record. In 1917 an execu-
tion was issued upon the portion of the lien then due.
Later, in September, a lease of the property was made to
M. J. Rohm and James C. Long, who agreed to protect
the property against the Hay judgment. The amount
necessary was to be advanced by the lessees and repaid
from royalties of not less than \$500 a year. Rohm paid

the portion then due, taking an assignment thereof, and of a like part of the collateral lien.

At the time of the making of the contract, it was represented that a siding was located upon the property, which was available for the shipping of coal, but investigation showed it to be built upon the land of another, and impossible of use by the lessees. Further inquiry elicited the fact that the statements as to the character and amount of coal were false. The contract was immediately repudiated, but the sum advanced by Rohm was not returned.

Later, the executrix of Rohm issued an execution on the part of the Hay judgment which had been assigned to her decedent. Defendants then took a rule to open the judgment, insisting that, under the agreement of lease, the payment of the claim had been assumed by Rohm, and that it should be equitably treated as satisfied. This was dismissed without prejudice, and a bill in equity was filed having the same purpose in view. After the hearing of testimony, the learned court below refused the relief prayed for on the ground that the agreement of lease was void and unenforceable, and that therefore the provisions for payment of the outstanding lien was of no effect.

The chancellor found that the false representations were the inducing cause to the making of the contract, and that there was a prompt repudiation when the truth was discovered. If this is so, then the conclusion that the agreement was unenforceable is correct, and the bill here filed was properly dismissed (*Braunschweiger v. Waits*, 179 Pa. 47; *Browning v. Rodman*, 268 Pa. 575; *Delafant v. Shapiro*, 73 Pa. Superior Ct. 186); and, under the well settled rules, the findings of fact are binding upon us unless manifest error appears: *Cruzan v. Cruzan*, 243 Pa. 165; *McConville v. Ingham*, 268 Pa. 507. An examination of the record shows ample justification for the conclusions reached.

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One question raised by the assignments of error requires consideration. The decree nisi was entered March 4, 1921, and, on April 25th following, counsel for the plaintiffs filed a paper asking for leave to amend their bill. On May 6th, without leave of court, an amended bill was filed. This was stricken off on June 22d, and on July 9th, a final decree was entered. The new pleading averred facts which must have been fully known to the plaintiffs at earlier stages in the proceedings. Evidence in support of the matters set forth could in the main have been offered in contradiction of the defense interposed to the original bill, and additional legal findings on the proof so offered could have been requested. The record shows testimony on both sides covering in part the new allegations.

The allowance of amendments rests in the reasonable discretion of the court, and, in the absence of plain error, its action will not be reversed. In the present case it was amply justified in refusing, after findings of fact and law had been made and the decree nisi entered, to permit the amendment asked for: *Muehlhof v. Boltz*, 215 Pa. 124; *Hoofstittler v. Hostetter*, 172 Pa. 575. Particularly is this so in view of the circumstances, which showed a failure to exercise due diligence in making the application: *Howard v. Borough of Olyphant*, 181 Pa. 191.

The refusal to permit one of the appellants to withdraw his bill on June 20th was likewise proper: *Beaver v. Slane*, 271 Pa. 317. A discussion of the specific assignments of error would be useless, and all are overruled.

The decree of the court below is affirmed at the costs of appellants.

Calligan v. Monongahela City, Appellant.

Negligence—Municipalities—Hole in pavement—Notice—Time—Constructive notice—High heeled shoes.

1. It is negligence for a city to leave so large a hole in one of its pavements that heels of the usual size will probably catch therein and cause the wearer to be thrown to the ground; but it is not required to anticipate the possibility of accidents by the use of abnormally narrow heels, however fashionable they may be.

2. Where the evidence shows a number of holes in a pavement, it is sufficient if the particular one, regarding which complaint is made, is proved to have existed for such a length of time as to require the city then to take notice thereof.

Argued October 3, 1921. Appeal, No. 112, Oct. T., 1921, by defendant, from judgment of C. P. Washington Co., May T., 1920, No. 268, on verdict for plaintiff, in case of Nora Calligan v. Monongahela City. Before MOSCHZISKER, C. J., FRAZER, WALLING, SIMPSON, KEPHART, SADLER and SCHAFFER, JJ. Affirmed.

Trespass for personal injuries. Before BROWNSON, J. The opinion of the Supreme Court states the facts.

Verdict and judgment for plaintiff for \$1,708. Defendant appealed.

Error assigned, inter alia, was refusal of judgment for defendant n. o. v., quoting record.

Carl E. Gibson, with him *W. K. Vance*, *C. L. V. Acheson* and *J. Boyd Crumrine*, for appellant.—The general rule is that it is the duty of the city to construct and maintain its public highways so that they shall be reasonably safe and convenient for ordinary use and travel. In performing this duty it is bound to use ordinary care and diligence, but is not bound to provide against the possibility of an accident: *Levine v. City*, 252 Pa. 181; *McIntyre v. City*, 238 Pa. 524; *Purcell v. Riebe*, 227 Pa.

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503; *Mason v. Phila.*, 205 Pa. 177; *King v. Thompson*, 87 Pa. 365; *Reed v. Boro.*, 213 Pa. 357; *Canavan v. City*, 183 Pa. 611.

Harry A. Jones, with him *Rody P. & Meredith R. Marshall*, for appellee, cited: *Smith v. Steel Car Co.*, 262 Pa. 550; *Bond v. R. R.*, 218 Pa. 34; *Shannon v. McHenry*, 219 Pa. 267; *Hardoncourt v. Iron Co.*, 255 Pa. 379.

OPINION BY MR. JUSTICE SIMPSON, January 3, 1922:

Plaintiff recovered a verdict and judgment for injuries resulting from an alleged defect in a sidewalk on one of defendant's streets, and the latter prosecutes this appeal, presenting for our consideration the following questions only: (1) Was the hole into which plaintiff stepped "such a defect in the sidewalk as to render it not reasonably safe, and create liability on the municipality charged with its maintenance"? and (2) Was there proof of "the existence of that particular defect, for a sufficient time to show constructive notice"?

At the place where the accident happened the pavement consisted of an iron framework, containing round pieces of glass, two and a quarter inches in diameter, through which light entered into a vault below. From some unstated cause, a number of the pieces of glass had fallen out or been removed, leaving holes in the pavement, and about 6 a. m. of February 17, 1920, "the morning being rainy and dark," while plaintiff was walking on the pavement, the heel of her shoe, which was "an ordinary woman's shoe, with a 'common sense' heel" caught in one of these holes, two layers of the heel were torn off and she was thrown down, receiving the injuries of which she complains. "The identical plate that was at the place of the accident," and a shoe and heel of the character worn by plaintiff, were shown to the jury.

That the city was charged with knowledge of the fact that women would use the pavement, and that a jury, in

a proper case, might find it was negligence to leave a hole therein, so large that heels of the usual size would probably catch in it and throw the wearer thereof to the ground, are propositions too plain to require argument. Much point was made regarding the shallowness of the hole, but this is a matter of no moment, where, as here, the sides were abrupt, thereby, as a jury might find, naturally catching and holding such a heel. We do not qualify our oft-repeated rulings in the case of inequalities in a pavement, caused by wear and tear or the actions of the elements; they have no relevancy in this class of cases. If the glass had been taken out on the day the pavement was laid, the danger would have been as great as it was on the day this accident happened. Had the heel of plaintiff's shoe been unusually narrow, and, by reason thereof, it had caught in the hole and she had been injured, the court below could have given binding instructions for defendant, for a municipality is not obliged to anticipate the abnormal, however fashionable it may be or become; but here, as stated above, the heels were of the usual size worn by women, and it was, therefore, for the jury to say whether or not the hole was of such a character as to naturally grasp this kind of a heel.

On the second question raised we are of opinion the proofs were sufficient to justify the jury in finding the existence of the particular defect for such a length of time as to affect the municipality with constructive notice thereof. There were eight such holes in the pavement, plainly visible in the daytime, and these facts alone should have called attention to its unusual if not dangerous condition. The trial judge, in his opinion, correctly epitomizes part of the evidence in plaintiff's favor, as follows: "John W. Dodds gave testimony from which the jury could find the existence of this particular hole at least two months previously. . . . It was identified by the plaintiff, by her subsequently finding a piece of her heel wedged fast in it, as being the third hole out

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from the building. Dodds testified that among the holes which he saw were one in the first row, at the corner of the plate, two about the sixth row, and two back from that toward the building. Photographs of the place, which are in evidence, show one hole just at the corner, in the first row of discs, i. e., the row next to the building; two contiguous holes, not in but near to the sixth row; and two between them and the building, one of the latter two being the one identified by the plaintiff. The photographs show that at the time of the accident there were only three holes (one of them the cause of the accident) between the sixth row of discs and the edge of the plate toward the building; and Dodds testifies to having seen, two months previously, three holes between that sixth row and the building. Evidently the hole in question was one of those which he saw." The jury having found from this and the other evidence in the case, that the particular hole in which plaintiff's heel caught, had existed for a sufficient time to charge the city with constructive notice thereof, we cannot say, as a matter of law, that their conclusion was erroneous.

The judgment of the court below is affirmed.

Bizet v. Smith, Appellant.

Contract—Building contract—Architect's certificate—Fraud, collusion or caprice—Nonperformance.

1. Where a building contract provides that the architect's certificate shall be final and conclusive, the amount specified therein can be recovered, unless there is proof that it was given as the result of fraud, collusion or caprice.

2. Where a building contract provides that all payments shall be due when certificates for the same are issued, that no certificate given or payment made except the final certificate or final payment shall be conclusive evidence of the performance of the contract, and that no payment shall be construed to be acceptance of defective work or improper materials, and a final certificate has been

given, honestly and in good faith, the defense of nonperformance of the contract is not available.

Argued October 3, 1921. Appeal, No. 150, Oct. T., 1921, by defendant, from judgment of C. P. Washington Co., May T., 1920, M. L. D., No. 16, on verdict for plaintiff, in case of John Bizet v. William C. Smith. Before MOSCHZISKER, C. J., WALLING, SIMPSON, SADLER and SCHAFFER, JJ. Affirmed.

Sci. fa. sur mechanic's lien. Before MCILVAINE, P. J. The opinion of the Supreme Court states the facts.

Verdict and judgment for plaintiff for \$1,589.48. Defendant appealed.

Errors assigned were various rulings and instructions, unimportant here, as appears by the opinion of the Supreme Court.

Vernon Hazzard, with him *Meyer Coldfarb*, for appellant.

David M. McCloskey, for appellee.

OPINION BY MR. JUSTICE SIMPSON, January 3, 1922:

Plaintiff agreed to build an addition to defendant's house, the contract requiring that the work should be done under the direction and subject to the approval of defendant's architects, that "all payments [therefor] shall be due when certificates for the same are issued" by the architects, and "that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials."

When plaintiff had completed the work, as he alleged it was to be done, he filed a mechanic's claim and then applied for and received from the architects a final

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certificate, stating that the balance of the contract price was due and payable, specifying the amount thereof and how it was made up. Defendant having refused to pay this balance, a scire facias was issued on the claim, an affidavit of defense was filed thereto, and, upon the trial, plaintiff recovered a verdict and judgment, from the latter of which defendant appeals.

It is not necessary to consider the assignments of error in detail, since we are all of opinion the court below should have given binding instructions for plaintiff. There was no evidence offered or produced in any way affecting the certificate of the architects, which, on the contrary, defendant admitted was honestly given, and not as the result of fraud, collusion or caprice, and hence barred the defense he endeavored to make: *Monongahela Navigation Co. v. Fenlon*, 4 W. & S. 205; *Hostetter v. City of Pittsburgh*, 107 Pa. 419; *Bowman Bros. v. Stewart*, 165 Pa. 394; *McCloskey v. Marks*, 263 Pa. 441.

This conclusion is not affected by the last clause above quoted "that no payment shall be construed to be an acceptance of defective work or improper materials," not only because it specifically refers to a "payment" only, which, so far as the present claim is concerned, has not yet been made; but also because it can only relate to the partial payments, for under the immediately preceding clause of the same paragraph, which of course must be considered in determining the meaning of this one, "the final certificate or final payment shall be conclusive evidence of the performance of this contract"

The judgment of the court below is affirmed.

Donnan, Appellant, v. Barnes.

Execution—Sheriff's sale—Distribution—Subrogation—Judgment—Maxims—In fictione juris, etc.—Appeals—Parties.

1. In distributing a fund realized at sheriff's sale, the party entitled thereto must make his own claim and must himself appeal,

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if the decision be against him; one to whose right he claims to be subrogated, but who has no personal interest, cannot properly claim the fund or appeal from the decree of distribution.

2. The court of common pleas, by virtue of whose process a sale is had, is required to determine what amount is due on judgments alleged to be entitled to any part of the proceeds, even though they may have been entered originally in the courts of some other county.

3. All such distributions must be made according to law and equity, hence the fund cannot be awarded to one not equitably entitled to receive it.

4. One who alleges he is entitled to subrogation, must show that in equity and good conscience it should be allowed.

Promissory notes—Endorsements—Priorities—Burden of proof.

5. Ordinarily the endorers on a note are liable in the order of their endorsements; he who asserts the contrary has the burden of proving the facts from which such a conclusion can properly be drawn.

Argued October 4, 1921. Appeal, No. 203, Oct. T., 1921, by plaintiff, from decree of C. P. Greene Co., June T., 1919, No. 13, sustaining exceptions to auditor's report, in case of John W. Donnan v. James R. Barnes. Before MOSCHZISKER, C. J., FRAZER, WALLING, SIMPSON, KEPHART, SADLER and SCHAFER, JJ. Affirmed.

Exceptions to report of A. H. Sayers, Esq., auditor on distribution of proceeds of execution.

The opinion of the Supreme Court states the facts.

Exceptions sustained. Plaintiff appealed.

Error assigned was order, quoting it.

W. J. Sturgis, with him *S. J. Morrow* and *Dean D. Sturgis*, for appellant.—The lien obtained by the filing of the transcript of the judgment from Washington County was the second lien and prior to the lien of all other judgments: *DeWitt's App.*, 76 Pa. 283; *West Branch Bank v. Chester*, 11 Pa. 282; *Hartz v. Woods*, 8 Pa. 471; *McCall v. Lenox*, 9 S. & R. 302; *Morris v. Campbell*, 186 Pa. 589.

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The Common Pleas of Greene County had no jurisdiction to inquire into alleged payments: *Brandt's App.*, 16 Pa. 343; *King v. Nimick*, 34 Pa. 297; *Nelson v. Guffey*, 131 Pa. 273; *Lehigh, etc., R. R. Co. v. Hanhauser*, 222 Pa. 248.

The exceptants failed to sustain their allegation that any part of the judgment was paid either before or after its entry: *Lennig's App.*, 93 Pa. 301; *McPherran's Est.*, 212 Pa. 432; *Shrewsbury's Savings Inst. App.*, 94 Pa. 309; *Peterson v. Lothrop*, 34 Pa. 223; *Guaranty T. & S. D. Co. v. Powell*, 150 Pa. 16.

E. C. Higbee, of Sterling, Higbee & Matthews, with him *W. J. Kyle, of Kyle & Reinhart, A. F. Silveus* and *A. C. Hagan*, for appellee.—The court had jurisdiction and there was no collateral attack on the judgment: *Skidmore v. Bradford*, 4 Pa. 296; *Jones v. Dilworth*, 63 Pa. 447; *McCann v. Farley*, 26 Pa. 173; *Templeton v. Shakley*, 107 Pa. 370; *Gordon's App.*, 93 Pa. 361.

Appellees sustained the claim that plaintiffs had been paid and any person claiming under the judgment in the right of *Donnan* must appear and show his interest: *Peterson v. Lothrop*, 34 Pa. 223.

Robinson was not a party to the record.

OPINION BY MR. JUSTICE SIMPSON, January 3, 1922:

On a writ of *levari facias*, based on a judgment recovered on foreclosure of a first mortgage on defendant's property, in Greene County, Pennsylvania, it was sold by the sheriff, who made a special return, under the Act of June 4, 1901, P. L. 357, setting forth that after payment of the costs, taxes and expenses, there remained in his hands the sum of \$244,997.93, for which he had taken plaintiff's receipts, one for \$134,179.48 in full for debt, interest and costs of said first mortgage, and the other for \$110,818.45 on account of debt, interest and costs of a second mortgage for \$85,000, also held by plaintiff. Exceptions were filed to the return, alleging that only

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\$47,291.02, was due on the second mortgage, leaving a balance of \$63,527.43, to which defendant's judgment creditors were entitled, and plaintiff was not. By agreement of the parties an auditor was appointed to distribute this balance; he reported in favor of awarding it to plaintiff, in accordance with the sheriff's special return; but, upon exceptions filed by appellees, the court below decreed they were entitled to it, and plaintiff then appealed.

Appellant admits he is not personally interested in the \$63,527.43, but alleges it belongs to one John T. Robinson, for whose benefit he claims it. At no time did Robinson appear before the auditor or the court below, nor does he appeal from the decree in favor of appellees, plaintiff alone appealing, in his own name and apparently in his own right, and not as the representative of Robinson. Since appellant has in fact no interest in the fund, we might well dismiss the appeal on this ground alone; the same result is reached, however, if we treat the appeal as taken by or on behalf of Robinson.

Excluding the first mortgage, which has been paid in full out of the price realized at the sale, and some 200 judgments against defendant, which will not be reached in the distribution, the liens upon the property, at the time of the sheriff's sale, were as follows:

(1) 1914, January 20th, the foregoing second mortgage of \$85,000, in favor of appellant.

(2) 1915, January 29th to March 18th, twelve judgments held by appellees.

(3) 1915, May 31st, judgment in favor of appellant on a transcript of a judgment from Washington County, which had been there entered by virtue of the warrant of attorney accompanying the bond secured by the foregoing second mortgage of \$85,000.

The first and last of said liens were, of course, for the same debt; and it is evident that the latter thereof, considered merely as a judgment, would take no part of the fund, because subsequent in entry to the judgments held

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by appellees; and hence the questions arising on this distribution must really be decided as between the mortgage itself and the twelve judgments. Appellant's claim is based on the legal fiction that the mortgage is merged in the judgment entered on the warrant of attorney, though, for the purpose of lien, the latter takes effect as of the place and date of record of the former; and hence, he says, appellees' claim of part payment could only be considered in Washington County, where the judgment was first entered. For certain purposes this contention, as to both fact and effect, is true, indeed necessarily so; but to it the maxim in *fictione juris semper aequitas existit* is particularly relevant, and hence the contention will not be sustained in a case like the present. If sustainable, it would be good though the judgment was first entered in the remotest and most inaccessible county of the State, and a transcript thereafter filed in Greene County; or, indeed, under the "full faith and credit" clause of the Constitution of the United States, if a judgment on the warrant of attorney had been entered in Florida or Texas, and a suit thereon had ripened into a local judgment in Greene County.

The sheriff's special return was made under the Act of June 4, 1901, P. L. 357, which says that, if exceptions are filed, "the court shall proceed to hear and determine the same, as now provided by law in case of disputes as to the distribution of the proceeds of sheriff's sales," that is, as provided by section 86 of the Act of June 16, 1836, P. L. 777, "according to law and equity." The distribution being in a court of equity, according to whose rules, indeed, all such distributions are made (*Wolf v. Ferguson*, 129 Pa. 272, 283; *McCune v. McCune*, 164 Pa. 613), and Robinson being entitled to subrogation only in case he was required to pay a debt for which one Barnes was primarily liable, and which in equity and good conscience the latter should have paid (*Lackawanna Trust & Safe Deposit Co. v. Gomeringer*, 236 Pa. 179), the burden was on Robinson to show the facts by virtue of

which he claimed to be subrogated, on this distribution, to the rights of the mortgagee; and here his case wholly fails.

As already stated, appellant admits that though the mortgage was given to him, he had no personal interest in it. He was president of the Citizens National Bank and also of the Washington Trust Company, each of Washington, Pa., and the mortgage was given to secure to them the payment of an antecedent indebtedness of one J. V. Thompson, represented by five notes, endorsed by several people for his accommodation and discounted by the bank and trust company; two of the endorser, at the time of the sheriff's sale, being Barnes and Robinson. Admittedly also, the bank and the trust company have been paid in full and have no interest in the distribution. Upon two of the notes Barnes was the only endorser, and the amount thereof was included in the \$47,291.02, which was allowed as a credit upon the price bid by appellant at the sale. Upon the other three notes Robinson was a prior endorser to Barnes, and, therefore, as between themselves, Robinson was, *prima facie*, the one ultimately liable. These three notes, which were also further protected by a mortgage given by Robinson on his own property, were paid by him, and his collateral mortgage thereupon satisfied; and the claim now made is, that he is entitled, by reason of this payment, to be subrogated to the right of the bank and trust company on the \$85,000 mortgage, to the detriment of appellees, as judgment creditors of Barnes, though in making the payment, he was, as between himself and Barnes, only paying his own debt. This would be against equity and good conscience and hence the claim to subrogation cannot be allowed. A different question would have arisen had Robinson appeared and set up facts sufficient to show that, despite the order of the endorsements, Barnes was, as between themselves, the primary debtor; but this he did not do.

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We have not overlooked appellant's contention that this second mortgage was given by Barnes, and the notes endorsed by him, because he was indebted to Thompson in a sum exceeding the amount of the mortgage, whereas Robinson was a creditor of Thompson, and hence only an accommodation endorser. It is difficult to make the first of these allegations accord with the fact that, in the proceedings in bankruptcy instituted against Thompson, Barnes was adjudicated a creditor in the sum of \$712,757.07; but whether he was a debtor or a creditor does not necessarily determine the rights of the parties here, where each was a surety for Thompson, since no agreement was shown that, as between Barnes and Robinson, the former was to be primarily liable notwithstanding the prima facies arising from the order of their endorsements. Especially is this true, since the contention, now made by appellant for Robinson, is in the teeth of the claim of the latter, in a suit he brought against Barnes in another county, wherein he alleged it was agreed all the endorsers, including Barnes and himself, were to be considered as equally bound, without regard to the order of their endorsements; a fact which, if true, directly contradicts the claim now made for Robinson, but which the latter did not undertake to prove on this distribution.

The decree of the court below is affirmed and the appeal is dismissed at the cost of appellant.

Kelly v. Watson Coal Co. et al.

Workmen's compensation—Death—Tuberculosis—Injury as contributing cause—Opinion of medical experts—Evidence—Hypothetical question.

1. An award for the death of an employee from tuberculosis, seven months after his injury, will be sustained where medical experts testify that the shock of the accident and consequent lowered vitality rendered the injured man particularly subject to the quick

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development of the disease from which he died, and that such development was, in all probability, due to the assigned cause.

2. In such case there is no merit in a complaint concerning the alleged incompetency of the medical testimony, where the doctors, some of whom attended the deceased, based their conclusions on a reading of the evidence in the case, and each stated the facts they assumed to be true, and which formed the basis of their conclusion, as much as though these facts had been put to them in the form of a hypothetical question.

Argued October 4, 1921. Appeal, No. 162, Oct. T., 1921, by the insurance carrier, defendant, from judgment of C. P. Indiana Co., June T., 1921, No. 5, affirming decision of Workmen's Compensation Board's award upon a hearing de novo, in case of Carrie S. Kelly v. Watson Coal Co. and Ætna Life Ins. Co. Before MOSCHZISKE, C. J., FRAZER, WALLING, SIMPSON, KEPHART, SADLER and SCHAFER, JJ. Affirmed.

Appeal from decision of Workmen's Compensation Board on hearing de novo. Before LANGHAM, P. J.

The opinion of the Supreme Court states the facts.

Decision affirmed. The insurance carrier appealed.

Errors assigned, among others, were the judgment, quoting it, and the admission of the testimony of experts, referred to in the opinion of the Supreme Court.

John M. Reed, with him *James W. Mack*, for appellant.—The Workmen's Compensation Board erred in admitting opinion testimony of physicians based on a reading of the entire testimony: *Yardley v. Cuthbertson*, 108 Pa. 395; *McDyer v. R. R.*, 277 Pa. 641; *Gillman v. Ry.*, 224 Pa. 267.

The evidence was insufficient to justify a finding that death resulted from the injury: *Moss v. Transit Co.*, 42 Pa. Superior Ct. 466; *Fink v. Axle & Spring Co.*, 270 Pa. 476.

S. J. Telford, for appellee.

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OPINION BY MR. CHIEF JUSTICE MOSCHZISKE, January 3, 1922:

At the inception of this suit, Carrie S. Kelly made a compensation claim against defendant coal company for the death of her husband, H. E. Kelly; this was allowed by the board and the decision was affirmed by the court below; the insurance carrier has appealed, contending that the evidence was insufficient to connect Kelly's death with the accident here in question and that the testimony of certain of the medical experts should not have been considered.

It appears from the evidence that Kelly, a carpenter in defendant's service, was injured March 19, 1918; he had been employed by the coal company for three years prior to the accident, was "a steady worker," and had lost no time on account of sickness, although there is some testimony that he was not what would be termed a robust man. Deceased was winding a crab, turning over a car to make some repairs on its bottom, when the crank flew out of his hands, striking him on the head and at a point on the left side of his abdomen near the waistline, knocking him down. The head was quite badly cut, but the injury to the body was not at first considered serious, although claimant testified there was a bruise "between the hip and waistline," and the patient told his doctor of an uneasy feeling on the left side of the abdomen; five days after the injury, he complained of soreness in the region of the left testicle, which, upon examination, was seen to be swollen, inflamed and tender; subsequently, about a month after the accident, an operation was performed to remove the testicle, and it was found to be infected with tubercular bacilli; following this, deceased had trouble with his hip, and a general consumptive condition developed. On November 6, 1918, he died, at the age of forty-six, of tubercular peritonitis.

On the facts above stated,—and as to them there is no conflict,—it was found that the "injuries sustained by the decedent" were due to "violence to the physical struc-

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ture of his body," which "so lowered his vital resistance that a tubercular condition.....quickly developed, hastening and causing his death."

There is ample medical testimony on the record to sustain the findings just recited, it being the opinion of several competent doctors, at least one of whom was an eminent expert, that the accident under investigation was a "contributory cause of the development of the tuberculosis.....which resulted in his [Kelly's] death." The doctors said there was "a direct connection between the trauma, injury, and the tubercular condition," upon the theory that the shock of the accident and consequent lowered vitality rendered the injured man particularly subject to the quick development of the disease from which he died, and that such development was, in all probability, due to the assigned cause. Under our cases, this was sufficient to warrant and sustain the award: *Dumbluskey v. Coal & I. Co.*, 270 Pa. 22; *Tracey v. Coal & I. Co.*, 270 Pa. 65; *Zukowsky v. Coal & I. Co.*, 270 Pa. 118; *Miller v. Director Genl. of Railroads*, 270 Pa. 330; compare *Fink v. Sheldon Axle Co.*, 270 Pa. 476.

While certain of the medical experts testified that they based their conclusions on a reading of the evidence in the case, yet each of them clearly stated the facts they assumed to be true, and which formed the basis of their conclusions, just as much as though these facts had been put to them in the form of a hypothetical question; and some of those who gave expert testimony were doctors who either actually attended or operated on the deceased. Under these circumstances, there is no merit in appellant's complaint concerning the alleged incompetency of the testimony in question.

The assignments of error are overruled and the judgment is affirmed.

**Pioneer Coal Co. v. Cherrytree & Dixonville R. R.
Co.. Appellant.**

Railroads—Eminent domain—Branch—Public or private use—Burden of proof—Equity—Act of June 19, 1871, P. L. 1360—Bill by private person—Procedural questions—Action of directors—Notice to director general of railroads.

1. In order to entitle a complainant in a bill in equity filed under the Act of June 19, 1871, P. L. 1360, to the equitable remedy which the statute provides, defendant, when properly challenged, must have failed to show a charter power to do the act complained of or it must be shown that something essential to the rightful exercise of the power sought to be asserted is lacking, or that some act has been committed which is so closely connected with defendant's right to exercise the power in question, as in effect to constitute a charter prohibition against its assertion under the facts in the particular case.

2. The burden of showing that a corporation is exercising franchises which it does not possess is on those alleging that it is attempting to do what it is not authorized to do.

3. Where a railroad company has a right to build an extension or a branch, it will be assumed, unless the contrary is plainly shown, that the railroad company's officials have performed their duty in good faith, when they declare a public necessity for an extension, or when they designate such extension as a branch.

4. The mere fact that some selfish interest may have inspired the plan for the construction of such section in no sense prevents that section from being classed as a "branch" road, or public use.

5. Wherever it appears from the attending circumstances that a section of road about to be constructed will in some direct way tend to contribute to the general public welfare, or the welfare of a considerable part of the public, such as the mining and marketing of the coal of the State, it cannot be said that it will not serve a public use.

6. Where a spur or siding from the main track of a railroad was originally built to serve a particular coal mine, the owners of such mine cannot maintain a bill in equity under the Act of 1871, to restrain the railroad company from condemning some of their land for the purpose of extending the tracks to serve another coal mine some distance beyond.

7. As such an extension will serve in part to get the coal supply of the State out of the mines, on its way to the consumer, to

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the great benefit of the public of Pennsylvania, the extension is one for public use, sufficient to justify the exercise of the right of eminent domain.

8. It is a rule that inquiry under the Act of 1871, is not permitted concerning the regularity of a condemnation from a mere procedural standpoint.

9. The complaint in a bill filed under the Act of 1871, to restrain the extension of a railroad, cannot allege that the extension was not authorized by the directors of the railroad company, or that the director general of railroads had not joined in the appropriation.

10. Such procedural defects must be determined in the condemnation proceedings proper.

Equity—Appeals—Findings against appellee.

11. On an appeal from a decree in an equity suit, the appellee cannot, in order to maintain a decree in his favor, rely on facts which the trial court expressly refused to find.

Argued October 4, 1921. Appeal, No. 50, Oct. T., 1921, by defendant, from decree of C. P. Indiana Co., March T., 1920, No. 2, on bill in equity, in case of Pioneer Coal Co. v. Cherrytree & Dixonville Railroad Co. Before MOSCHZISKE, C. J., FRAZER, WALLING, SIMPSON, KEPHART, SADLER and SCHAFFER, JJ. Reversed.

Bill in equity under Act of June 19, 1871, P. L. 1360, for an injunction. Before LANGHAM, P. J.

The opinion of the Supreme Court states the facts. Injunction awarded. Defendant appealed.

Error assigned, among others, was decree, quoting it.

J. N. Banks, for appellant.—The fact that the Rodkey spur was built at a time when there was no necessity for extending it beyond the necessities of the Rodkey mine does in no way give the Pioneer Coal Company an exclusive title or right and the extension of the road to a private coal mine is not sufficient to defeat the right of defendant to extend its road: *Mountz v. R. R.*, 265 Pa. 67; *Windsor Glass Co. v. Carnegie Co.*, 204 Pa. 459;

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Williams v. R. R., 255 Pa. 133; Rudolph v. R. R., 166 Pa. 430; Scott v. Pittsburgh, 266 Pa. 52; McAboy's App., 107 Pa. 548.

The purpose of the condemnation is fully stated in the resolution of the board of directors and in the petition, and in these proceedings the court had no authority to go beyond the resolution of the board of directors and the petition for condemnation to find a purpose other than that contained in the resolution and petition: Mountz v. R. R., 265 Pa. 67; McAboy's App., 107 Pa. 548, 558; Rochester & Pittsburgh Coal & Iron Co. v. Mining Co., 24 Pa. Co. Ct. R. 104; Gring v. Water Co., 270 Pa. 232, 245, 246.

A. M. Liveright, with him *S. M. Jack*, for appellee.—A railroad company under guise of its power to construct branches cannot condemn land to extend an industry track to the plant of a competitor of the industry, incidentally taking a part of the industry track: Lance's App., 55 Pa. 16; Jones v. Tatham, 20 Pa. 398.

It must clearly appear that the use will result in some public benefit: Com. v. Bond, 214 Pa. 307; Com. v. Ry., 203 Pa. 608; Vinton Colliery Co. v. R. R., 226 Pa. 131.

Whether the use to which it is sought to appropriate the property authorized to be taken by proceedings under the right of eminent domain, is a public use is a judicial question for the determination of the courts: Phila., etc., St. Ry. Pet., 203 Pa. 354; Edgewood Ry. Co.'s App., 79 Pa. 257; Smedley v. Erwin, 51 Pa. 445; Jacobs v. Water Supply Co., 220 Pa. 388.

From the outset of this contest the coal company has objected to the lack of formal procedure by the railroad company and has persisted in its contention that no recognized method evidencing corporate action has been taken or proved: State Hospital for Criminal Insane v. Water Supply Co., 267 Pa. 29; Boalsburg Water Co. v. Water Co., 240 Pa. 198; Johnston v. R. R., 245 Pa. 338.

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A railroad company while under federal control, cannot condemn land through its corporate officers without concurrence or joinder of the director general or other federal authority: Northern P. R. R. v. North Dakota ex rel., 250 U. S. 135.

OPINION BY MR. CHIEF JUSTICE MOSCHZISKE, January 3, 1922:

This is a proceeding in equity, under section 1 of the Act of June 19, 1871, P. L. 1360, by the Pioneer Coal Company against the Cherrytree & Dixonville Railroad Company, to restrain the latter from building what it claims to be an extension of a branch road, and what plaintiff contends is a mere spur or siding facility for the private use and benefit of a competing coal company; the injunction was granted and defendant has appealed.

Plaintiff has some 1,800 acres of coal land in Indiana County, mined by another company, the latter owning the stock of the former; defendant operates a railroad in the vicinity, a spur or branch of which, leading from a portion of the railroad known as the "Buck Run Branch," is employed as a siding by plaintiff in taking coal from its "Rodkey" mine; this section of road, hereinafter called "Rodkey Spur," is approximately 2,200 feet long, was built in 1905, and since that time has been used solely for transporting coal from plaintiff's mine, constituting the only railroad outlet for that purpose; the condemnation proceedings enjoined in this case were "brought in connection with a proposed extension of the Rodkey Spur eastwardly fifteen hundred feet to lands of the Indiana Moshannon Coal Company, in the course of which seven hundred and fifty lineal feet of surface, an acreage of 1.047, owned by the plaintiff. . . . , are to be taken," and "the proposed taking will appropriate also eighty feet of the eastern end of the Rodkey Spur itself"; this will interfere with the operation of plaintiff's mine and thus materially injure that company.

In addition to the facts already stated, the court below found the following: Defendant's road was built by other and larger railroad corporations, "as and for a public steam railroad, with all the rights of.....eminent domain"; when the present condemnation proceedings were begun, on January 19, 1920, this railroad was under "federal control, operation and management," and "the Director General of Railroads" was not made a party to the proceedings; such control terminated on March 1, 1920; plaintiff had "more than one hundred thousand tons of coal unmined at the Rodkey operation," on August 28, 1920, and, "labor conditions permitting," this might be produced at the rate of "about two hundred tons per day." Defendant suggests that by now plaintiff's coal must be approaching exhaustion; but, of course, as to this, we have no knowledge.

These facts, among others, appear in the chancellor's answers to plaintiff's requests: The Indiana Moshannon Coal Company is the only interest that will at present be served by the extension of the Rodkey Spur, and those concerned could be served equally well from the main line of defendant railroad. On the other hand, the chancellor found, at defendant's request, that the ground on which the spur in question is laid was owned in fee by defendant company, having been conveyed to it by plaintiff in 1908; and he refused to find, as desired by plaintiff, that defendant had not taken "proper corporate action" to support its proposed appropriation, or that its board of directors had not passed the necessary resolution authorizing the taking of the land intended to be appropriated.

The court below placed its final conclusion, granting the injunction, squarely on the ground that "defendant railroad company, under the guise of an exercise of the power.....to condemn for the construction of a 'branch,' is attempting to take land privately owned for the construction of what cannot be considered a 'branch' within contemplation [of the law], consequently it is

endeavoring to exercise a power not possessed under its franchise....."; and, the court adds, this "is not the abuse of a franchise power, which admittedly can be questioned only by the Commonwealth, but rather an effort to exercise a nonexistent power which may be successfully contended against by an individual under authority of the Act of 1871."

Defendant contends that, on the facts in this case, the above conclusions are wrong, for several reasons, which we shall presently discuss; while plaintiff takes the position that not only are those conclusions correct in every particular, but the chancellor should have rested his injunction on the additional grounds that no proper resolution to authorize the condemnation had been proved as duly passed by defendant's board of directors, and that such proceedings were void in law because not joined in by the director general of railroads. Neither of these latter positions were adopted by the trial tribunal, although urged upon it.

It is contended by defendant that plaintiff failed to show a case for relief under the Act of 1871; in *Gring v. Sinking Spring Water Co.*, 270 Pa. 232, this court recently gave rather elaborate consideration to that statute, during the course of which (p. 237) we said that section 1 of the act (eliminating certain words unnecessary to an understanding of its terms) provides: "In all proceedings, in courts of law or equity, in which it is alleged that the private rights of individuals are injured by any corporation claiming to have a right or franchise to do the act from which such injury results, it shall be the duty of the court to examine, inquire and ascertain whether such corporation does in fact possess the right or franchise to do the act from which such alleged injury results, and, if such right or franchise has not been conferred upon such corporation, such courts shall restrain such injurious acts."

The opinion we are now discussing (*Gring v. Water Co.*) states (p. 238) that "the cases where relief was

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granted" under the act fall within several classes, and one of these is there designated thus: "(2) those in which, though the power [in a general sense, to do the thing complained of], was apparently given by the corporation's charter, it was attempted to be exercised in a manner, for a purpose or to an extent not authorized by law." Immediately after our list of classifications, we reviewed the authorities which give rise thereto and (pp. 240-241) cited, *inter alia*, examples of what is meant by "in a manner," "for a purpose," and "to an extent," as used above. *Edwards v. Pittsburgh Junc. R. R. Co.*, 215 Pa. 597, 602, is mentioned as an instance of an attempt to exercise an alleged franchise power "in a manner" not authorized by law; *Bly v. White D. M. W. Co.*, 197 Pa. 80, "for a purpose," and *Boalsburg Water Co. v. State College Water Co.*, 240 Pa. 198, "to an extent" not so authorized. We had no intention, however, to use the phrase "in a manner" as covering procedural points, and this is clearly indicated at page 238 of the opinion; nor did we intend the phrase "for a purpose.....not authorized by law" in a broad, comprehensive sense, but only in that suggested by the authority we had in mind. In other words, we did not mean to intimate that the state's right of inquiry into the purpose for which a franchise was to be used could be assumed by the plaintiff in an equity suit brought according to the Act of 1871; and the comment connected with our mention of *Bly v. White Co.*, at the bottom of page 243, shows this, as also does our citation of other cases (p. 244), asserting the right of the State, under circumstances quite similar to those in the *Bly* case, to make such inquiry to the exclusion of private complainants; on the latter point see also *Mountz v. Pittsburgh, B. & L. E. R. R. Co.*, 265 Pa. 67.

What the *Gring Case*, as a whole, stands for, so far as the meaning of the Act of 1871 is concerned, plainly appears by the following excerpts from the opinion (p. 241, 242, 246): "The question, in each case of the char-

acter of the one now before us, is as to the existence of the charter right, and, if found, then, Is the corporation defendant attempting to exercise its franchise under circumstances authorized by law?—for it can possess the right only to that extent.....; each decision, from one aspect or another, turns on the theory of the nonexistence, under the attending circumstances, of a charter right to do the particular thing in question, the rule seeming to be that inquiry in a proceeding resting on the statute must bear some direct relation to the ascertainment of a charter power or right to commit the act complained of, and that restraint can be granted only on a finding of either the nonexistence of the power or its nonexistence for the purposes to which it is being put to the injury of the complainant.....; both the actual words of the legislation before us and the decisions in point indicate that, in order to entitle one to the equitable remedy which the statute provides, defendant, when [properly] challenged, must have failed to show a charter power to do the act complained of, or it must be shown that something essential to the rightful exercise of the power sought to be asserted is lacking, or that some act has been committed which is so closely connected with defendant's right to exercise the power in question as in effect to constitute a charter prohibition against its assertion under the facts in the particular case, but when any of these conditions appear, equitable relief is available,—it always being understood, however, that the statute does not clothe the courts, at the instance of a private suitor, with the Commonwealth's general powers of inquiry." Numerous cases, illustrative of these general principles, will be found reviewed on their facts in the authority from which the above-quoted excerpts are taken.

Appellee concedes, if the enjoined portion of defendant's road may properly be classed as a branch, then the court below erred. In *McAboy's Appeal*, 107 Pa. 548, 557-8, we said that the question whether a proposed

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piece of railroad was a branch did not "depend either upon its length or direction"; that any "section" of the road, whether it were an offshoot of the main road or of another section, might be a branch within the meaning of the law. If the section of defendant's road here in question is a branch, that concededly is the end of plaintiff's case; or, as we shall show later, if the part in controversy is to be built for a public use, whether a branch or not, defendant, under the facts in this case, cannot be restrained. On the other hand, if, as the court below states, defendant, "under the guise of an exercise of its power to construct a branch," is using its right of eminent domain for the purpose of constructing a mere private siding, not for public use, the Act of 1871 was properly invoked.

We cannot, however, agree with the court below that, either in deciding whether the section of road complained of is a branch, or in determining whether or not it is intended for public use, a rule of strict construction is to be applied, if by "strict construction" is meant that, on a review of the evidence, all doubts must be resolved against the corporation; on the contrary, the rule is that "the burden of showing the company is exercising franchises which it does not possess is on those alleging that [the corporation] is attempting to do what it is not authorized to do—construct a railroad for purely private purposes" (*Deemer v. Bells Run R. R. Co.*, 212 Pa. 491, 493); the corporate directors have power to decide as to the location of, and public necessity for, an extension of any part of the road, be it a branch or otherwise (*Mayor of Pittsburgh v. Penna. R. R.*, 48 Pa. 355, 359; *McAboy's App.*, *supra*, 557), and it is to be assumed, unless the contrary is plainly shown, that such officials, like all other officials, have performed their duty in good faith, when they declare a public necessity for an extension, or when they designate it as a branch; "it is not the special use made [of a section of road] which characterizes it [as a part of the public road], but its convenient

necessity to that part which is [undeniably] for public use" (P., W. & B. R. R. Co. v. Williams, 54 Pa. 103, 107); finally, the mere fact that some selfish interest may have inspired the plan for the part in controversy in no sense prevents that section from being classed as a "branch" road, or for public use: *Oliver v. Thompson's Run Bridge Co.*, 197 Pa. 344, 346. The learned chancellor seems to have overlooked most of these rules, and we incline to the belief that the court below erred in its mixed conclusion of fact and law that the section of road here enjoined was not a branch; but it is not necessary to rest our decision on that point, since, under the Pennsylvania authorities, it plainly appears that, even were the section in question properly classed as a "spur," or a "siding," the evidence fails to show it was not to be constructed for a public use, and if the use can be classed as of this character, the proposed condemnation would be an exercise of defendant's franchise, which could not be enjoined under the Act of 1871.

What constitutes public use is a point not free from difficulties, but wherever it appears from the attending circumstances that a section of road about to be constructed will in some direct way tend to contribute to the general public welfare, or the welfare of a considerable element of the public, it cannot be said that it will not serve a public use; this principle is now too well established in Pennsylvania to be questioned: *Getz's App.*, 10 W. N. C. 453, 456, cited with approval in *Pittsburgh, etc., Ry. Co. v. Stowe Twp.*, 252 Pa. 149, 160; *Lycoming Edison Co. v. Public Service Commission*, 67 Pa. Superior Ct. 608, 611. Here, conceding that the extension under discussion will be largely employed to take coal from the Moshannon Company's properties, yet, since it must also be conceded that the life, happiness and prosperity of the people of Pennsylvania depend to a very large degree upon getting the coal supply of the State out of the mines, on its way to the consumer, this in itself, on the facts at bar, stamps a project like

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that before us as one for public use, sufficiently to justify the exercise of the right of eminent domain.

In the instant case, the original extension from the main line was toward the mine of the complainant; now it is to be carried further on, so as to open up another and very considerable field, and it may be that, in the future, further extensions, by branches or otherwise, will be called for to satisfy patrons who require transportation facilities, and to serve public needs. There are no facts present sufficient to overcome the presumption that defendant corporation is doing what it conceives to be its duty as a common carrier, bound to keep up with public demands, or to indicate that it will not continue to so act in the future; but, if at any time it fails in these regards, "the remedy is through appropriate proceeding instituted by the Commonwealth": *Rudolph v. Schuylkill Valley R. R. Co.*, 166 Pa. 430, 437, 444; *Vinton Colliery Co. v. Blacklick, etc., R. R. Co.*, 226 Pa. 131, 135; *Pittsburgh, etc., Co. v. Stowe Twp.*, 252 Pa. 149, 161; *Mountz v. Pittsburgh, B. & L. E. R. R. Co.*, 265 Pa. 67, 69.

The case largely depended upon by appellee, *Edgewood R. R. Co.*'s App., 79 Pa. 257, 270,—where we say, what of course is still the rule, that owners of land "have the right to demand the interposition of those safeguards [provided by the Act of 1871] when private property is appropriated [under the guise of serving a public use] for a strictly private use" (see also *Smedley v. Erwin*, 51 Pa. 445, 451; *Mory v. Oley Valley Ry. Co.*, 199 Pa. 152, 155; *Deemer v. Bells Run Ry. Co.*, 212 Pa. 491, 493; *Vinton Colliery Co. v. Blacklick, etc., R. R. Co.*, 226 Pa. 131, 135),—is distinguished on its facts from the case at bar, for there the railroad itself was in no sense a public one, while here there is no doubt of the public character of defendant's road. This distinction of *Edgewood's App.*, which is noted by us in a number of subsequent cases (see *Rudolph v. Schuylkill Valley R. R. Co.*, 166 Pa. 430, 436; *Windsor Glass v. Carnegie Co.*, 204 Pa.

459, 466; *Gring v. Sinking Spring Water Co.*, 270 Pa. 232, 239), also applies to *McCandless's App.*, 70 Pa. 210. We have examined all the authorities cited by plaintiff and think none of them controls the present controversy in its favor; this case, on the main points involved, falls more within the principle of *Getz's App.*, *supra*.

It is the general rule that inquiry under the Act of 1871 is not permitted "concerning the regularity of a condemnation from mere procedural standpoints": *Gring v. Sinking Spring Water Co.*, 270 Pa. 232, 238; *Williams v. D., L. & W. R. R.*, 255 Pa. 133, 144. This rule is sufficient answer to plaintiff's contention that defendant had failed to prove the resolution for the appropriation to have been actually passed by its directors; although a copy of such resolution was accepted in evidence. The rule also answers the contention that the director general of railroads had not joined in the appropriation. Both of these points involve questions of procedure, which might be raised in the condemnation proceedings proper, but have no place in an equity suit under the Act of 1871, since neither of them, if sustained in fact, would tend to show that defendant had acted in the premises beyond its franchise rights.

It is true that, in *Gring v. Sinking Spring Water Co.*, 270 Pa. 232, 252 et seq., we discussed the subject of proving a resolution authorizing appropriation, and suggested the advisability of showing all relevant facts in connection therewith; but this was to meet the manner in which that particular case was being tried, and, so far as possible, to have the matter disposed of for the satisfaction of those concerned, since the record was about to be sent back for further hearing. We did not intend to lay down any principle contrary to the general rule that inquiry under the Act of 1871 is confined to the charter or franchise rights of the defendant corporation and does not comprehend examination into alleged defects of procedure in asserting such rights; although, of course, "whether the proposed construction be a siding or

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a branch, in either case, when property [is] condemned, such taking must be by a corporate act, with as much formality as though it were a part of the main roadbed": *Lycoming Edison Co. v. Public Service Commission*, 67 Pa. Superior Ct. 608, 612, by KEPHART, J. On the general subject of corporate action to condemn, see also *Boalsburg Water Co. v. State College Water Co.*, 240 Pa. 198, 209. But, returning to the point urged by plaintiff (appellee), that the actual passage by the defendant company's directors of the above-mentioned resolution had not been proved, we may add, to what has been said previously concerning this matter, that the relevant findings, to the extent they go, favor appellant, as hereinbefore indicated, therefore appellee is not in a position (on this, its opponent's, appeal) to question the fact of the resolution in any manner; and our opinion in *State Hospital v. Consolidated Water Supply Company*, 267 Pa. 29, 38, 39 (cited by appellee), contains nothing to the contrary. That case, so far as the point in hand is concerned, turned on the well-established rule that an appellee may, to sustain the decision appealed from, suggest legal reasons other than those depended on by the court below; it in no sense justifies the contention that one may, to support a decree in his favor, depend on facts which the trial court expressly refused to find, yet that is what the present appellee would do.

In conclusion, whether or not the appropriation of plaintiff's land is in any way defective from a procedural standpoint must be determined, if such a determination is desired, in the condemnation proceedings proper, and, if the appropriation is sustained, the question of damages must be adjusted there; hence we have neither elaborated nor discussed the findings concerning the nature and extent of the injury which plaintiff claims it will suffer. Defendant is a corporation enjoying the power of eminent domain, and, so far as the present record shows, nothing appears to warrant equitable in-

interference with the exercise of that power; the court below erred in deciding otherwise.

The decree is reversed, the injunction is set aside, and the bill is dismissed; plaintiff to pay the costs.

Callihan v. Montgomery, Appellant.

Workmen's compensation—Course of employment—Regular course of business—Casual employment—Acts of June 2, 1915, P. L. 736, and June 26, 1919, P. L. 642—Review on appeal—Facts and law.

1. A person who enlists himself in the army of industrial and business workers must, in order to entitle himself to the benefits of the Workmen's Compensation Act, undertake more than a mere casual or incidental job; he must enter the ranks of those employed in the regular course of business of his particular employer, and, when such a worker claims compensation, it must appear that he was injured in the course of his employment.

2. Since the Act of June 26, 1919, P. L. 642, amending the Workmen's Compensation Act of June 2, 1915, P. L. 736, the appellate court has the entire record before it, but its revisory powers are limited to a determination of the question whether there is evidence to support the findings, and whether the law has been properly applied to them.

3. The determination of the applicability of the provision of the act excluding those whose employment is "casual in character and not in the regular course of the business of the employer," depends, under any given state of facts, upon the interpretation or construction of the act, and is a question of law.

4. In a proceeding for compensation for damages for death of claimant's husband, the question whether there is evidence to sustain findings that deceased was, or was not, doing certain things when injured, is one of fact, which may be reviewed to the extent only of deciding whether there is such evidence in the record; but if the evidence appears, the findings thereon are of fact, and are not subject to review.

5. Whether, on the facts found, the deceased was killed in course of his employment, and also whether the employment was "casual in character and not in the regular course of the business of the employer" within the meaning of the act, are questions of law, and, as such, open to review.

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6. In order to come within the act, an injury to an employee need not arise out of his employment; all that is necessary is that it occur in the course of that employment. The fact that the employee may have been guilty of contributory negligence is immaterial.

7. The provision in article III, section 301, of the Act of June 2, 1915, P. L. 738-9, is broad enough to include every injury received on the premises of the employer, during the hours of employment, so long as the nature of the employment demands the employee's presence there, regardless of whether his presence at the particular place where the injury occurred is actually required, if there is nothing to prove a virtual abandonment of the course of employment by the injured person, or that, at the time of the accident, he was engaged in something wholly foreign thereto.

8. In order to bring a workman within the exception of those employees not covered by the statute, it must appear that the employment was both casual in character and outside the regular course of the business of the employer.

9. The casual employment of one for the performance of an odd job, may occur in conducting a business and still not be within its regular course.

10. The words "regular course" refer to the normal operations which regularly constitute the business in question, excluding incidental or occasional operations arising out of the transaction of that business, such as, now and again, repair of the premises or appliances or machinery used therein.

11. A claim by a wife for compensation for the death of her husband will be dismissed on the ground that, while deceased was killed in the course of his employment, such employment was casual and not in the regular course of business of the employer, where it appears that deceased, a skilled mechanic in business for himself, was employed by an oil company to repair an engine, at the deceased's customary charge per hour; that during the progress of the work it was found necessary to take the cylinder of the engine to deceased's shop for reboring; that after waiting a few minutes for defendant's employee to get ready to transport him, deceased, for some undisclosed reason, stepped into an adjoining pump house on defendant's premises, was caught in the machinery, and killed.

12. Such ruling does not exclude from the benefit of the compensation law all those employed at unit, sometimes called "contract," prices, based on quantity of work done, because in many such cases the duties performed are neither casual nor out of the regular course of the business of the employer.

Workmen's compensation — Exceptions — Fact and law—Remitting record.

18. The rule that when the common pleas sustains an exception to an award and reverses the action of the board, it must remit the record to that body for further hearing and determination, concerns only exceptions to findings of fact.

Argued October 5, 1921. Appeal, No. 189, Oct. T., 1921, by defendant, from judgment of C. P. Butler Co., Sept. T., 1921, No. 135, sustaining decision of Workmen's Compensation Board which affirmed award of referee, in case of *Ida Callihan v. Noble Montgomery*. Before MOSCHZISKE, C. J., FRAZER, WALLING, SIMPSON, KEPHART, SADLER and SCHAFFER, JJ. Reversed.

Appeal from decision of Workmen's Compensation Board affirming award of referee. Before REIBER, P. J. The opinion of the Supreme Court states the facts. Decision affirmed. Defendant appealed.

Error assigned, inter alia, was order, quoting it.

James E. Marshall, of *Marshall & Watson*, for appellant.—An employee's engagement is casual in character when it comes about by chance, fortuitously, and for no fixed duration of time: *Maryland Casualty Co. v. Pillsbury*, 172 Calif. 748.

The deceased being a skilled mechanic, owning and operating his own independent machine shop, and being hired on account of his skill to do the work in his own way without any direction from defendant or his agent, was an independent contractor: *Smith v. State Workmen's Ins. Fund*, 262 Pa. 286.

James M. Galbreath, for appellee, cited: *Dzikowska v. Superior Steel Co.*, 259 Pa. 578; *Blouss v. R. R.*, 73 Pa. Superior Ct. 95; *Knorr v. R. R.*, 268 Pa. 172; *Dickson v. Hollister*, 123 Pa. 421.

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OPINION BY MR. CHIEF JUSTICE MOSCHZISKE, January 3, 1922:

Defendant, operating an oil well, employed plaintiff's husband, O. F. Callihan, a skilled mechanic, engaged in business for himself, to repair an engine used to run a pump, under agreement to pay the latter his customary charge of \$1.25 an hour for the time required to make the repairs; during the progress of this work it was found necessary to take the cylinder of the engine to Callihan's shop for reboring. After waiting a few minutes for a representative of defendant to get ready to transport him, Callihan, for some undisclosed reason, stepped into an adjoining pumphouse, on defendant's premises, was caught in the machinery and killed. The widow claimed compensation, which the referee allowed; when the award was sustained by the compensation board and the court below, defendant took the present appeal, contending (1st), that at the time of his death deceased was not engaged in the furtherance of the business of defendant; (2d), that Callihan's employment was merely casual; (3d), that he was not employed in the regular course of the business of defendant; and (4th), that he was an independent contractor.

In a broad sense, the Workmen's Compensation Law, Act of June 2, 1915, P. L. 736, was passed for the mutual benefit of employers and employees directly engaged in the regular course of industrial or business life. It is a tacit recognition of the fact that such employees differ from those workers for hire who keep themselves detached, in order to use their labor and abilities in the best markets and most advantageous ways which may from time to time present themselves. The former class of employees, unlike the latter, are not as a rule in a position to seek out and grasp opportunities for advantageously using what little capital they may accumulate; hence, in event of injury, these workers cannot as readily care for themselves and those dependent on them for support. All of which, inter alia, created a public feel-

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ing that they were entitled to the protection of such a system as the statute before us sets up, and this brought about its enactment. The system thus inaugurated guarantees standardized compensation in cases of injury to employees, but one who enlists in the army of industrial and business workers must, in order to entitle himself to the benefits of the act, undertake more than a mere casual or incidental job; he must enter the ranks of those engaged in the regular course of the business of his particular employer, and, when such a worker claims compensation, it must appear that he was injured in the course of his employment.

Article IV, section 409, of the Compensation Act (P. L. 1915, p. 751) originally provided that findings of the compensation board on questions of fact were to be final, and certain of our decisions have held that, under this section, the question whether deceased was engaged in the "furtherance of the business or affairs of [his] employer," that is, "in the course of his employment," at the time he received the injury complained of, being one of fact, the finding of the referee in that regard, when approved by the compensation board, was conclusive (*Poluskiewicz v. Phila., etc., Co.*, 257 Pa. 305, 307; *Messinger v. L. V. R. R. Co.*, 261 Pa. 336, 338; *Galligher v. Walton Mfg. Co.*, 264 Pa. 29, 32; *Ferri v. Lenni Quarry Co.*, 266 Pa. 264, 266); but, in connection with these cases, see *Flucker v. Carnegie Steel Co.*, 263 Pa. 113, 118, and other of our more recent decisions, which point out that such findings are also in the nature of conclusions of law, and are reviewable as such.

At the dates of the decisions in the cases just referred to, the evidence was not before the appellate court (*Ambrose v. Coxe Bros. & Co.*, 266 Pa. 536, 537), the judicial review then being limited to an inspection of the record to ascertain whether the underlying facts duly found adequately sustained the ultimate conclusion appealed from, and whether the judgment was in conformity to

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law: *McCauley v. Imperial Woolen Co.*, 261 Pa. 312, 323.

The amendment of June 26, 1919, P. L. 642, 665-6, made material changes in procedure; under article IV, section 427, of this act, where an appeal is had to the common pleas, it is the duty of the board to certify to such court "its entire record, . . . including the notes of testimony," and it is provided that an appeal may be taken to the Superior or Supreme Courts, to be prosecuted "in the same manner and form and with the same effect as is provided in other cases of appeal" to those tribunals.

Since the Act of 1919, the appellate court has the entire record before it, but its revisory powers are limited to a determination of the question whether there is evidence to support the findings of fact, and whether the law has been properly applied to them; this is somewhat analogous to the power of review in cases of appeal from confirmation of auditors' reports or from decrees in equity: *Kuca v. L. V. Coal Co.*, 268 Pa. 163, 165; *Strohl v. E. P. Ry. Co.*, 270 Pa. 132, 133.

What constitutes injury or death by accident in the course of employment, and who is an employee within the meaning of the compensation law, are defined in article III, section 301, and article I, section 104, of that act, the latter definition expressly excluding those whose employment is "casual in character and not in the regular course of the business of the employer." The ultimate determination of the applicability of these definitions, under any given state of facts, therefore, depends upon the interpretation or construction of the act, and is a question of law. This rule was applied in *Flucker v. Carnegie Steel Co.*, 263 Pa. 113, 118, where we said: "As to the ultimate conclusion, upon which the award rests, that 'deceased met his death from injuries received by accident occurring in the course of his employment with the defendant company,' it is contended by appellant that this presents a mixed question of fact and law,

which may be reviewed on its latter aspect. In a measure, the contention is sound, for since the compensation act undertakes to define the meaning of the phrase 'injury by an accident in the course of his employment' (see section 301, article III, P. L. 738-9), in each instance the question of law is presented as to whether or not the underlying findings of fact [and, since the Act of 1919, the evidence] are sufficient to bring the case within the statutory definition."

A recent and relevant statement of the scope of review in compensation cases is found in the opinion of Mr. Justice SIMPSON in *Stahl v. Watson Coal Co.*, 268 Pa. 452, 454, as follows: "The question whether or not the vital point [that decedent was injured in the course of his employment, as defined by the act] sought to be deduced from the basic facts, may fairly be inferred therefrom, is one of law and may be reviewed; but, if it can be, the [ultimate] finding is one of fact, and is not the subject of review."

Blake v. Wilson, 268 Pa. 469, 473-6, treats the point, whether an employment was casual and not in the regular course of the business of the employer, as one of law.

The rule applied in the decisions to which we have referred brings us to this determination: in a case like the present, the proposition, whether there is evidence to sustain findings that deceased was, or was not, doing certain things when injured, is one of law, which may be reviewed to the extent only of deciding whether there is such evidence in the record; but, if the evidence appears, the findings thereon are of fact, and are not subject to review. Whether, on the state of facts found, he was killed in the course of his employment, and also whether the employment was "casual in character and not in the regular course of the business of the employer," within the meaning of these several phrases as used in the act, are questions of law, and, as such, open to review.

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Before examining into the character and nature of deceased's employment, we shall first consider whether he was killed in the course thereof,—for, if not, there is no necessity to inquire further.

In order to come within the act, an injury to an employee need not arise out of his employment; all that is necessary is that it occur in the course of that employment, and this includes all such injuries, except those caused by the intentional acts of third persons, done for reasons personal to the employee and not directed against the employer, and self-inflicted injuries. The fact that claimant may have been guilty of contributory negligence is immaterial: *Dzikowska v. Superior Steel Co.*, 259 Pa. 578, 583.

The definition, in article III, section 301, of the act (P. L. 738-9), of what is meant by an injury occurring in the course of the employment, expressly provides, *inter alia*, that it includes "all injuries caused by the condition of the premises or by the operation of the employer's business or affairs thereon, sustained by the employee who, though not so engaged [in the furtherance of the business or affairs of the employer], is injured upon the premises occupied by or under the control of the employer, or upon which the employer's business or affairs are being carried on, the employee's presence thereon being required by the nature of his employment."

The provision just quoted is broad enough to include every injury received on the premises of the employer, during the hours of employment, so long as the nature of the employment demands the employee's presence there, regardless of whether his presence at the particular place where the injury occurred is actually required, if there is nothing to prove a virtual abandonment of the course of his employment by the injured person, or that, at the time of the accident, he was engaged in something wholly foreign thereto.

In the case at bar, the employment of Callihan had not ceased when the accident happened; there yet remained the work of reboring the cylinder and replacing it on the engine, which was to be put in running order. The employer undertook to transport him, his tools and the cylinder, to and from his shop. The actual work had ceased only until it could be resumed in the shop, and the employment continued during the time needed for the transportation. It is true there is nothing to show that the employment of deceased required him to enter the pumphouse, but the latter immediately adjoined the place where he was engaged, and the engine on which he was working was used to operate the pump. There may well have been some valid reason, in connection with his work, for entering the pumphouse; but, if not, his stepping into it was merely a temporary digression while waiting the few minutes required for the return of the employer, and, according to our decisions, there was no break in the course of the employment under such circumstances.

In connection with the statement just made, see *Flucker v. Steel Co.*, 263 Pa. 113, 119; we there said: "While no facts appear indicating anything to the contrary, it may be presumed logically that an employee at his regular place of service, during his usual working hours, is there in discharge of some duty incident to his employment, and, when the dead body of an employee is found on the premises of his employer, at or near his regular place of service, under circumstances fairly indicating an accidental death which probably occurred during the usual working hours of the deceased, the inference may fairly be drawn, in the absence of evidence to the contrary, that the employee was injured in the course of his employment."

In *Dzikowska v. Superior Steel Co.*, 259 Pa. 578, 582, an employee, whose regular occupation was in the shipping room of his employer's plant, came from the room during a temporary break in his work and went into a

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box car; a few moments after this he was seen running out with his clothing aflame. There was no direct proof of how the unfortunate man caught fire, but it was supposed that he went into the box car to smoke, and, in striking a match, his clothing, which was saturated with oil, became ignited. We held the claimant was entitled to compensation, saying: "This was not a rest period; it was not a period when, by the rules of the employment, the employee was free from the duties of his employment; it was an indeterminate period of waiting for the occurrence of an event which would renew the active operations of the employment, ... ; if an accident happened at such a time, there would be no break in the employment, even though the workman is paid by the hour for the time he is actually at work, especially where the accident occurs on the employer's premises or about his property, unless the workman is doing something that is wholly foreign to his employment."

In *Knorr v. Central R. R. of N. J.*, 268 Pa. 172, 175, we held that one furnished with free transportation, to and from his work, was still engaged in his general employment during such transportation, albeit he stopped off a short period on the way home to transact some personal business; and we sustained an award of compensation: see also *Blouss v. Delaware, L. & W. R. R. Co.*, 73 Pa. Superior Ct. 95, 97; *Hale v. Savage F. B. Co.*, 75 Pa. Superior Ct. 454, 459; *Messer v. Mfg., etc., Co.*, 263 Pa. 5, 8; *Haddock v. Edgewater Steel Co.*, 263 Pa. 120, 123.

It is true that in *Kuca v. Lehigh Valley Coal Co.*, 268 Pa. 163, 167, compensation was refused where the deceased deliberately left his regular working place and traveled some distance to another part of defendant's mine, entering an abandoned opening, where he caused an explosion of gas; but there the facts presented indicated that the injured man had voluntarily abandoned the course of his employment, whereas here, as previously pointed out, they indicated the contrary. We con-

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clude that deceased was "injured [and killed] by accident in the course of his employment," in the sense of these words as used in the compensation law.

The question remains, however, was the employment, during the performance of which Callahan met his death, "casual in character and not in the regular course of the business of defendant," within the meaning of such phrases in the act under consideration? It will be noticed that, in order to come within the exception of those employees not covered by the law in question, the employment must be both casual in character and outside the regular course of the business of the employer: Article I, section 104, of the Compensation Act, P. L. 1915, p. 736; *Tarr v. Hecla Coal Co.*, 265 Pa. 519, 522-3.

In *Marsh v. Groner*, 258 Pa. 473, 479, L. R. A. 1918 F (note, p. 275), we held that one employed to do some plastering, in connection with the remodeling of defendant's dwelling, was a casual employee, not engaged in the regular course of the employer's business, and therefore not entitled to compensation. Again, in *Blake v. Wilson*, 268 Pa. 469, 477, one employed by a farmer, to paint a silo, was held to be a casual employee. An investigation of the outside authorities sustains the position taken by us in these cases, as we shall proceed to show.

In *Chicago, etc., R. R. Co. v. Industrial Com.*, 284 Ill. 573, 120 N. E. 508, it was held that a structural ironworker, engaged for a few days to complete a driveway in connection with a freight house, was engaged in casual employment, the court correctly saying (579): "The legislature certainly intended.....to give some meaning to 'casual,' and we assume from a reading of the statute that it intended to give the ordinary common meaning, that is, workmen are engaged in casual employment when they are employed only 'occasionally,' 'irregularly' or 'incidentally' as distinguished them from those employed regularly and continuously."

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Maryland Casualty Co. v. Pillsbury, 172 Cal. 748, 158 Pac. 1031, holds that one engaged by the owner of a farm to repair a tractor was a casual employee, the court saying (751) that "casual" is "something that comes without regularity and is occasional and incidental"; in *State ex rel. v. Dist. Court*, 138 Minn. 103, 107, 164 N. W. 366, a person employed to construct a temporary building to replace one destroyed by fire, on a farm owned by the employer, though not operated by him, was held a casual employee.

Western Union Tel. Co. v. Hickman, 248 Fed. 899, 900, (construing the West Virginia act), where a lineman, temporarily employed by a telegraph company to assist in repairing a portion of its line, was held to be but a "casual" employee, contains an interesting discussion of the subject in hand, pointing out differences, in phraseology, in the English and certain of the American compensation acts, and saying: "This noticeable departure from the language of the English statute indicates a legislative intent to broaden the exception and place it on a different basis; its apparent effect is to make exemption depend, not on the nature of the work performed, but on the nature of the contract of employment. If the hiring be incidental or occasional, for a limited and temporary purpose, though within the scope of the master's business, the employment is 'casual,' and covered by the exception; and so it has been held by the courts of states whose compensation acts have substituted 'casual employment,' or words of the same import, for the 'employment of a casual nature,' found in the English statute: *In re Gaynor*, 217 Mass. 86, 104 N. E. 339, L. R. A. 1916A, 363; *In re Cheevers*, 219 Mass. 244, 106 N. E. 861; *Aurora Brewing Co. v. Industrial Board*, 277 Ill. 142, 115 N. E. 207; *Maryland Casualty Co. v. Pillsbury*, 172 Cal. 748, 158 Pac. 1031. Thus in the *Gaynor Case*, *supra*, in which the subject is discussed at length, the court says that 'casual' is the antonym of 'regular,' 'systematic,' 'periodic,' and 'certain.' These decisions, and the con-

vincing reasons on which they rest, warrant the conclusion that plaintiff was engaged in 'casual employment' when the accident occurred." See also *Blood v. Industrial Acc. Com.*, 30 Cal. App. 274, 275, 157 Pac. 1140.

While the rule adopted in Wisconsin and some other states (see *Holmen Creamery Assn. v. Industrial Com.*, 167 Wis. 470, 471, 167 N. W. 808; *F. C. Gross & Bros. Co. v. Industrial Com.*, 167 Wis. 612, 614, 167 N. W. 809) differs from that in most jurisdictions, the weight of opinion supports the view that the word "employment" refers to the contract of hiring, more than to the kind of services rendered; that if a person is engaged incidentally and occasionally and for a limited and temporary purpose, though the work may be within the scope of the employer's business, he is a casual employee; and that the word "casual," as thus construed, means "incidental." In this connection, it may be noted that the Standard Dictionary gives "incidental" as the only synonym for "casual."

When the tests stated in the authorities reviewed are applied to the circumstances at bar, we have a case of "casual" employment, and, in fact, the court below so found; but it further found that "nevertheless what he [deceased] was doing [at the time of the accident] was in the regular course of the business of the employer," and, therefore, notwithstanding the casual nature of his employment, he came within the Compensation Law. We must next consider the legal soundness of this last conclusion, so far as the finding of the regular course of the business of the employer is concerned.

This court held, in *Marsh v. Groner*, 258 Pa. 473, 478, that a man employed by a married woman to do plastering in connection with the remodeling of her dwelling, was not engaged in the regular course of the business of the employer because, as a matter of fact, she was not pursuing a business within the meaning of the act; and we there defined one's business to be "the habitual or regular occupation that the party was en-

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gaged in with a view to winning a livelihood or some gain." Following this case, we held, in *Blake v. Wilson*, 268 Pa. 469, 479, that the employment of a person to complete a silo, on which work had been suspended for some time, was not in the regular course of the business of the owner of the farm on which it was constructed, saying: "With the particular object determined, the regular course of the business can only refer to the experience and custom in the conduct of the business as is of usual, if not daily, occurrence and observation. It is suggested that if such had been the meaning the legislature intended to convey, an apter expression would have been 'in the course of the regular business of the employer.' We think, on the contrary, such change in phraseology would have made the thought obscure. Not only so, but there can be no warrant for transposition of the terms; the meaning, as it stands, is not doubtful when it is considered that the word 'regular,' as it is used, does not qualify the word 'business' but the course of the conduct of that business; when that is 'regular' the condition of the act has been met."

The decisions of other jurisdictions do not wholly agree, either in the interpretation of the meaning of the phrases under consideration or as to their application, but the strong trend of opinion coincides with the view expressed in the Pennsylvania cases just referred to.

Holbrook v. Olympia Hotel Co., 166 N. W. 876, 200 Mich. 597, 603 (a Michigan case, in which state the act excludes "any person whose employment is but casual or is not in the usual course of the trade, business, profession or occupation of his employer"), held that a painter and decorator, employed to paint and decorate rooms in a hotel, was not an employee engaged in the usual course of the business of the employer, the court stating: "It would seem that occasionally renovating the rooms of a building or the building itself, owned or occupied by the owner as a home, with paint or paper or both, is not in the usual course of the trade, business,

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profession or occupation of the owner, unless he is himself in the business of painting and decorating. No reason can be found for concluding that the owner of a hotel is pursuing his business, within the meaning of the law, when he causes the rooms to be occasionally painted and decorated, although it is usual to have work of that nature done from time to time."

In *Blood v. Industrial Commission*, 30 Cal. App. 274, 276, 157 Pac. 1140, it was decided that one employed to paint a house was not in the usual course of the employer's business, the court saying: "The contract of employment of Heck by the petitioner to paint his house was casual. It was a mere occasional and incidental contract not constituting or connected with any regular systematic, periodic or certain business." See also *Maryland Casualty Co. v. Pillsbury*, 172 Cal. 748, 158 Pac. 1031, a case of repairs to a farm tractor; *La Grande Laundry Co. v. Pillsbury*, 173 Cal. 777, 779, 161 Pac. 988, concerning repairs to the roof of a house; *London, etc., Co. v. Industrial Acc. Com.*, 173 Cal. 642, 645, 161 Pac. 2, where an injured railroad man was fighting fire on a farm, not belonging to the railroad company, and asked compensation from the latter; and *Armstrong v. Industrial Com.*, 36 Cal. App. 1, 2, 171 Pac. 321, where a carpenter was employed at a daily wage to erect a dwelling house. In all of these cases compensation was refused.

State ex rel. v. Dist. Court, 138 Minn. 103, 106, 164 N. W. 366, held that a man employed to construct a temporary building to replace one destroyed by fire, on a farm owned by the employer, though not operated by him, was engaged in work which was "not in the usual course of the trade, business, profession or occupation of the employer"; it is there stated: "The words 'usual course' must be regarded as more restrictive than the language employed in the Connecticut and English acts. . . . Assuming the lease obligated defendant to erect a shelter for his tenant's stock. . . ., we may say, in a

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certain sense, the erection became his business or duty, but that cannot be the meaning of the word 'business' in this statute; it must.....refer to the employer's ordinary vocation, and not to every occasional, incidental, or insignificant work he may have to do.....Certainly neither the renting of the farm nor the construction of this shed can be referred to as coming within the 'usual course' of defendant's business or occupation."

In *Carter v. Industrial Acc. Com.*, 34 Cal. App. 739, 740, 168 Pac. 1065, it was held that one employed by a grain dealer to load cars with grain, which had been left on the station platform because of a shortage of cars, was not engaged in the usual course of the business of his employer; it is there said: "The loading was not within the usual business of the employer; the employment must come within the normal operations of the usual and ordinary business of the employer, in order to make him liable. This usual and ordinary business here did not involve the loading of the grain, but embraced simply the purchase and transportation after the grain was loaded upon the cars. In other words, the applicant was casually employed to do work which was not ordinarily and usually done by or under the direction of the employer in the business in which he was engaged." Perhaps the decision in this case goes a little far.

The English cases are of little value in construing the Pennsylvania statute, because of differences in phraseology between the English act and our own. The American compensation acts pretty generally employ the words "regular" or "usual" course of the employer's business. Undoubtedly, there are American cases, such as *State ex rel. v. Dist. Ct.*, 141 Minn. 83, 169 N. W. 488, and others there cited, which construe these words differently from the authorities mentioned in this opinion; but the latter are in the majority and agree more nearly with the view indicated in the Pennsylvania decisions already cited, and here relied on to support the ruling

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that Callihan, at the time of his injury, was not employed in the regular course of the business of defendant.

The casual employment of one, for the performance of an odd job, may occur in conducting a business and still not be within its regular course. For instance, emergency repair work on a machine used in the operation of a business can always be said to take place in the course of that business, as all machinery, at some time or other, is bound to need repair; but such work if not of a kind usually performed by or under the control of the person conducting the business, would be outside the regular course thereof. The legislature evidently intended, by the use of the words "regular course," to give them some definite significance and the most natural meaning is that they refer to the normal operations which regularly constitute the business in question, excluding incidental or occasional operations arising out of the transaction of that business, such as, now and again, repairing the premises, appliances or machinery used therein. While repair work may be considered an important incident to any business using machinery, and, in some cases, may enter into the customary operations of such a business (for example, when men are engaged as regular employees for the purpose of keeping the machinery in order), yet the repairs we are here considering were no part of the regular course of the business conducted by defendant, which is producing oil; they represent merely an odd job, incidental to that business, but not part of the work ordinarily done by or under the control of the employer in this particular case. On the other hand, such repairs might well be classed as within the regular course of the business of plaintiff's deceased husband.

As the employment of deceased to repair the machine in question was casual and not in the regular course of the business of defendant, his widow is not protected by the Pennsylvania act.

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The view just stated would not exclude from the benefit of the compensation law all those employed at unit, sometimes called "contract," prices, based on quantity of work done, as is argued by plaintiff, because in many such cases the duties performed are neither casual nor out of the regular course of the business of the employer.

While we have overruled appellant's first contention, we have sustained the second and third, which control the case; therefore, it is unnecessary to consider the question whether deceased was an independent contractor.

We take occasion to say that, although many cases from other jurisdictions are mentioned in this opinion, they are cited, not as authorities with us, or to signify our approval of all the conclusions therein reached, but merely to show the trend of opinion on the points under discussion.

What we said in *Kuca v. Lehigh Valley Coal Co.*, 268 Pa. 163, 165, to the effect that "when the common pleas sustains an exception to an award and reverses the action of the board, it must remit the record to [that body] for further hearing and determination (article IV, section 427, Act of June 26, 1919, P. L. 642, 646)," concerns only exceptions to findings of fact, as may be seen by its context and the part of the statute in question there being dealt with.

The judgment of the court below and the award of the compensation board are both reversed; judgment is here entered for defendant.

**Lawton v. Diamond Coal & Coke Co. et al.,
Appellants.**

Workmen's compensation—Death on houseboat—Jurisdiction—Admiralty—Navigable waters—Landing—Findings of compensation board—Workmen's Compensation Act.

1. The Pennsylvania Workmen's Compensation Act applies to a case where a workman is killed in the course of his employment in a houseboat on which he lives permanently, attached to a landing by ropes, and belonging to a corporation operating boats on navigable rivers, where it appears that the houseboat was not moved about, that the landing was its fixed location, and that it was considered part of the landing.

2. In such case, if the compensation board does not find that the houseboat was in the water, or between high and low water-mark, there is sufficient to establish jurisdiction under the Pennsylvania law, and not under admiralty law.

Argued October 10, 1921. Appeal, No. 95, Oct. T., 1921, by defendants, from judgment of C. P. Allegheny Co., Jan. T., 1921, No. 2660, affirming decision of Workmen's Compensation Board on hearing de novo, in case of Ella Lawton v. Diamond Coal & Coke Co., and Ætna Life Ins. Co., insurance carrier. Before MOSCHZISKE, C. J., FRAZER, WALLING, KEPHAERT, SADLER and SCHAFER, JJ. Affirmed.

Appeal from decision of Workmen's Compensation Board on hearing de novo. Before MACFARLANE, J.

The opinion of the Supreme Court states the facts. Decision affirmed. Defendants appealed.

Error assigned, inter alia, was above order, quoting it.

William A. Challener, with him Clarence Burleigh, for appellants.

Robert M. Steffler, for appellee.

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PER CURIAM, January 3, 1922:

We adopt the following excerpts from the opinion of the common pleas: "This is an appeal by defendant from an award, to the widow of Neil Lawton, made by the Workmen's Compensation Board, and the question involved is whether the case is one of admiralty jurisdiction. The defendant corporation operates steamboats on the Allegheny, Monongahela and Ohio Rivers, navigable waters under the acts of Congress. On December 26, 1919, Lawton was employed by defendant as superintendent of its landing, situated near the junction of these rivers.....He was killed [during the course of his employment] on a houseboat owned by defendant. Lawton and his family lived on this houseboat. It was not found by the board that the houseboat had any other purpose or use; it was attached to the landing by ropes, and was not moved about; the landing was its fixed location, and it was considered part of the landing. The board states: 'We are therefore of the opinion, relying on the above, that this accident happened on land; the Workmen's Compensation Board has jurisdiction.'.....The board did not find as a fact that the houseboat was on land; it drew a conclusion of law from recited facts; nevertheless it did not find that [the houseboat] was in the water, or between high and low water-mark. They found sufficient to show jurisdiction and nothing to oust it."

We agree with the court below that the Workmen's Compensation Law of Pennsylvania applies.

Judgment affirmed.

Kossell, Appellant, v. Rhoades.

Timber—Unlawful cutting—Trespass—Possession—Adverse possession—Residence—Cultivation, etc.

1. Plaintiff, in an action to recover damages for the unlawful cutting of trees, must not only show title or ownership of the

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land, but also possession or right to immediate possession at the time of the trespass.

2. While a warrant for unimproved lands gives to the owner such constructive possession as will enable him to maintain trespass, it cannot be effective against one who has an actual adverse possession of the land.

3. Actual possession may be by residence without cultivation or by inclosure and cultivation without residence.

4. Where, in an action for unlawful cutting of timber on unimproved land, plaintiff claims by a record title, but does not aver or show possession and the defendant shows actual possession for more than forty years, plaintiff cannot maintain the action, but must first establish title by an action of ejectment.

Argued September 28, 1921. Appeal, No. 52, Oct. T., 1921, by plaintiff, from judgment of C. P. Somerset Co., Dec. T., 1919, No. 100, on verdict for defendant, in case of *Annie M. Kossell v. Elmer E. Rhoades et al.* Before MOSCHZISKER, C. J., FRAZER, WALLING, SIMPSON, KEPHART, SADLER and SCHAFFER, JJ. Affirmed.

Trespass for unlawful cutting of timber. Before SLOAN, P. J., specially presiding.

The opinion of the Supreme Court states the facts.

Verdict and judgment for defendant. Plaintiff appealed.

Error assigned, inter alia, was refusal of plaintiff's motion for judgment n. o. v.

E. E. Kiernan, with him *Frank R. Coder*, for appellant.—Adverse possession must be specially pleaded and the facts clearly set forth on which defendant relies to prove his case, in his affidavit of defense: *Barclay v. Barclay*, 206 Pa. 307; *Murphy v. Taylor*, 63 Pa. Superior Ct. 85.

Charles H. Ealy, with him *Charles F. Uhl* and *Clarence L. Shaver*, for appellees.—To maintain the action of trespass, there must be in plaintiff either actual pos-

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session or the right of immediate actual possession, flowing from the right of property: *Olewine v. Messmore*, 128 Pa. 470; *Lewis v. Carsaw*, 15 Pa. 31; *Weitzel v. Marr*, 46 Pa. 463; *Rifener v. Bowman*, 53 Pa. 313; *Hartley v. Spencer*, 75 Pa. Superior Ct. 449; *Wilkinson v. Connell*, 158 Pa. 126; *Collins v. Beatty*, 148 Pa. 65.

OPINION BY MR. JUSTICE KEPHART, January 3, 1922:

Plaintiff, to recover damages for the unlawful cutting and conversion of trees, must show not only title or ownership of the land but also possession or the right to immediate possession at the time of the trespass: *Lewis v. Carsaw*, 15 Pa. 31, 34; *Crawford v. Forest Oil Co.*, 208 Pa. 5, 15; *Reilly v. Crown Petroleum Co.*, 213 Pa. 595, 600. While a warrant for unimproved land gives to the owner such constructive possession as will enable him to maintain trespass, it cannot be effective against one who has an actual adverse possession of the land: *Baker v. King*, 18 Pa. 138, 144; *Irwin v. Patchen*, 164 Pa. 51, 67. A fence, partly stone and partly rail, built for more than forty-five years, separates the lands occupied by plaintiff and defendant, and that in dispute lies within defendant's lines. While there was no fence separating the locus in quo from his cultivated or cleared lands, it was used for pasture, for cutting timber as needed and other uses. Actual possession may be by residence without cultivation or by inclosure and cultivation without residence: *Olewine v. Messmore*, 128 Pa. 470, 482. While there may have been fugitive trespasses on this land by plaintiff, they were not sufficient in themselves to constitute possession; plaintiff does not aver possession in her statement of claim; nor is there other evidence of her possession. Under these facts, constructive possession attaching to wild or unimproved land is not sufficient (*Caldwell v. Walters*, 22 Pa. 378, 380), as defendants were admittedly in possession under a claim of right for many years prior to the institution

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of this suit, sufficient to give them title by adverse possession if their evidence is believed by the jury.

The question of constructive possession passes out of a case when uncontradicted evidence of actual possession appears. Plaintiff, however, failed to establish actual possession, and, as defendant introduced much evidence of adverse possession for forty years or more, plaintiff cannot maintain this action of trespass, but must first establish her title by action of ejectment.

The court below submitted to the jury all questions in the case through some misunderstanding of counsel, and ultimately, for the reason above set forth, refused plaintiff's motion for a new trial and judgment n. o. v. The case should not have been submitted to the jury and defendant's point for binding direction should have been sustained: *Baring v. Peirce*, 5 W. & S. 548, 552; *Collins v. Beatty*, 148 Pa. 65. Plaintiff's right to institute her action of ejectment is not barred by this decision.

Judgment affirmed.

Householder v. Quemahoning Coal Co., Appellant.

Mines and mining—Surface support—Release—Damages—Covenants—Injury to water supply—Drilling well for water—Care of well—Negligence—Evidence—Presumption—Equity maxim—Sic utere tuo.

1. The owner of an entire estate may, in conveying, relieve the owner of the mineral estate from the duty to support the surface and from liability for any injury or damages by mining and removing coal.

2. Where in such case the grantee simply removes coal, it is not improper mining; even if such removal is negligently done, there can be no recovery.

3. Where a conveyance of coal provides that if the removal of the coal destroys a water supply of a building on the surface, the grantee shall bore a well and case it to a certain depth, and it appears that the successor in title to the grantee drilled and cased a well, and that thereafter the casings were broken and destroyed in mining operations to the destruction of the water supply, the

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court, in an action against the owner of the coal for damages, commits reversible error if it charges that defendant was required to refrain from all acts which would interfere with, injure or destroy the well.

4. In such case, defendant owes the owner of the surface only the duty of refraining from negligent acts, which might injure the well.

5. The maxim that one must so use his own property as not to injure another has reference not to the mere infliction of damage but to the violation of a right and means only that one must so use his own as not to violate a legal right of another.

6. Where coal is being mined solely by one person from underlying strata owned by him, the presumption is, when the coal is removed, the owner removes it, although done by his employees; and if there is evidence, such as breaking, subsidence and other conditions, to indicate that coal was being removed, there is a sufficient connection between defendant and acts resulting in an injury to the surface from the mining of the coal.

Pa. Cent. Brewing Co. v. Lehigh Valley Coal Co., 250 Pa. 300, distinguished and explained.

Sanderson v. Coal Co., 86 Pa. 401, 102 Pa. 370, commented on.

Argued September 28, 1921. Appeal, No. 106, Oct. T., 1921, by defendant, from judgment of C. P. Somerset Co., Dec. T., 1920, No. 187, on verdict for plaintiff, in case of Harry M. Householder v. Quemahoning Coal Co. Before MOSCHZISKE, C. J., FRAZER, WALLING, SIMPSON, KEPHART, SADLER and SCHAFER, JJ. Reversed.

Trespass for injuries to water supply from mining operations. Before BERKEY, P. J.

The opinion of the Supreme Court states the facts.

Verdict and judgment for plaintiff for \$1,725.78. Defendant appealed.

Errors assigned, among others, were various instructions, sufficiently appearing by the opinion of the Supreme Court, quoting record.

Francis J. Kooser, with him *Ernest O. Kooser* and *Norman T. Boose*, for appellant, cited: *Atherton v. Coal*

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Clarence L. Shaver, with him *Charles F. Uhl* and *Charles H. Ealy*, for appellee, cited: *Devlin v. Light Co.*, 198 Pa. 583; *Simons v. Ry.*, 254 Pa. 507.

OPINION BY MR. JUSTICE KEPHART, January 3, 1922:

Plaintiff owned seven acres of surface, the coal under it being owned by defendant. The titles were subject to the following covenants: The owner of the surface released "all claims for damages for injury to the..... land, or to any waters,.....caused.....by the exercise of any of the rights and privileges hereby granted. Provided that.....lands permanently injured by caving in.....shall be paid for at double the present assessed valuation." "Provided also that if the removal of the coal destroys the water at the building on said premises, then the parties operating said mines are to bore a well and case it to the depth of thirty feet below the lowest coal seam mined."

Defendants interfered with the water in mining the solid coal, and then drilled a well to a point thirty feet below the lower seam; later, however, in moving the pillars left standing for the well's support, the casings were broken or destroyed and it was impossible to secure water. These are substantially the averments in the statement and the undisputed facts.

Where there has been a severance of the mineral rights from surface rights, the owner of the mineral estate, in the absence of a contract to the contrary, owes a duty to support the overlying surface. This naturally follows from the location of the two estates. But it is equally true the owner of the entire estate may, in conveying, relieve the owner of the mineral estate from the duty to support the surface and from liability for any injury or damage by mining and removing the coal. In

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each case the relative rights of the owners have been settled by many of the decisions of this court: *Miles v. Coal Co.*, 217 Pa. 449, 451; *Stilley v. Pgh.-Buffalo Co.*, 234 Pa. 492, 496; *Graff F. Co. v. Scranton Coal Co.*, 244 Pa. 592, 596; *Weakland v. Cymbria Coal Co.*, 262 Pa. 403, 405; *Atherton v. Clearview Coal Co.*, 267 Pa. 425, 432. These cases hold that, where the grantee simply removes the coal, it is not improper mining; even if such removal is negligently done, there can be no recovery: *Atherton v. Clearview Coal Co.*, *supra*.

The release covered any damage from the loss of water, and, if nothing further appeared, plaintiff could not recover; the subsequent clause as quoted had the effect of excepting the water at the buildings from the release. If it was "destroyed," a well was to be bored and cased to a depth of thirty feet below the lowest seam. It was clearly the intention of the parties to preserve a supply of water at the plaintiff's buildings, or the means to procure it if it was below the lower seam. The release in question did not cover an injury to the well after it was constructed, for it would be a useless thing to effect such an arrangement if the owner of the coal had the right, through negligent mining, to immediately thereafter destroy it without any liability. The owner of the coal owed the surface owner the same duty with regard to the pipe and the way covered by it as though it were, by contract, laid on surface land owned by defendant; that is, to refrain from any negligent act which would interfere with the proper exercise of the surface owner's right, or that would, through lack of reasonable care, injuriously affect his pipe-line.

The court below charged the jury "that after the well was drilled, cased and tubing put in to use by the plaintiff, under the law the defendant was required to refrain from all acts or things which would interfere with, injure or destroy the well and casing or render the water in the well inaccessible to the plaintiff," and declined to charge the jury that "if they found from the evidence

that the defendant did not interfere with or destroy the pillar of coal through which said well was drilled by some careless or negligent act, then defendant cannot be held liable in damages." In the opinion, refusing the motion for judgment and new trial, the court reiterated its position by holding "that if the defendant for any reason whatever made such use of his property as to materially interfere with the privilege to which the owner of the reservation-easement was entitled, that such use of its property was unlawful." This has the effect of making the subservient owner, or even an innocent person, situated as defendant was, liable as an insurer, and fixes an arbitrary and absolute rule of responsibility; in principle, this bears a very close resemblance to that in *Rylands v. Fletcher*, L. R. 3 H. L. 330; but this doctrine does not prevail in Pennsylvania,—the *Sanderson Case* cannot be carried to this extent.

Defendant, as owner of the coal, had the right to remove it, but, as the mining near the pipe was attended with the risk of damaging a neighbor's property, appellant is answerable for such conduct, as its diligence is proportioned to the apparent risk; so, if defendant failed to exercise due care in removing the coal and damage results, the failure would be actionable negligence. Suppose the pipe-line had leaked, permitting an accumulation of water sufficient to destroy defendant's electric motor or other mine machine. What would be the rule as to plaintiff's conduct? We find it expressed in the following cases, and the converse must apply to defendant: *Briegel v. Phila.*, 135 Pa. 451; *Kibele v. Phila.*, 105 Pa. 41; *Koelsch v. Phila. Co.*, 152 Pa. 355; *Rumsey v. Phila.*, 171 Pa. 63; *Heh v. Consolidated Gas Co.*, 201 Pa. 443; *Hartman v. Citizens Natural Gas Co.*, 210 Pa. 19, 21; *Zimmer v. Phila.*, 57 Pa. Superior Ct. 20, 21. There may be authorities apparently to the contrary, but when examined carefully we find them to be cases of nuisances. The principle has recently been stated by this court in *Jackman v. Rosenbaum Co.*, 263 Pa. 158,

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170: "No cause of action arises from the doing of a lawful act or the exercise of a legal right, if done or exercised in a lawful and proper manner, the resulting damage, if any, being *damnum absque injuria*. A liability may, however, arise from the doing of a lawful act, or the exercise of a legal right, in negligent or improper manner; but in such cases the liability is based not upon the act done, but upon the manner of doing it. While there is an ancient maxim to the effect that one must so use his own property as not to injure another, the maxim, in its legal sense, has reference not to the mere infliction of damage, but to the violation of a right, and means only that one must so use his own as not to violate a legal right of another. Everyone has a right to the natural use and enjoyment of his own property, and, for lawful acts done by one person upon his own property in a lawful and proper manner, there is no cause of action, although damage to another may incidentally result therefrom."

There may be cases where the evidence of negligence may be slight, as the care of the subject-matter necessitates; but here there is abundant evidence of negligence. It was not necessary for the charge to go beyond it. Where coal is being mined solely by one person from land owned by him, the presumption is, when the coal is removed, the owner removes it, though done by his employees. This would fix the person responsible for moving the coal under plaintiff's land; the other evidence, the breaking, subsidence and other conditions, indicate coal was being removed. The connection between defendant and the acts complained of was clearly shown.

Reference has been made to the case of *Pa. Cent. Brewing Co. v. Lehigh Valley Coal Co.*, 250 Pa. 300, 304. This case was predicated on neglect by defendant, and, while the court does say the company "had no right to interfere in any way with the well or with the pipe in which the water was conveyed to the surface," it ultimately finds negligence in the manner in which the

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coal was removed from around the pipe as the basis of recovery. The court was in error in charging the jury as to defendant's responsibility.

Judgment reversed with a venire facias de novo.

Seitz, Appellant, v. Pennsylvania Railroad Co.

Ejectment — Boundaries — Uncertainty — Evidence — Case for court — Burden of proof.

1. In an action of ejectment the case should not be submitted to the jury where plaintiff's evidence presents no definite or certain limits to the land in controversy, and it would not be possible for a surveyor to locate the boundary lines, or for the jury to describe the property in a verdict.

2. In such case the burden of proof is on plaintiff to show the property lines.

Argued September 20, 1921. Appeal, No. 19, Oct. T., 1921, by plaintiff, from order of C. P. Armstrong Co., March T., 1917, No. 99, entering judgment for defendant n. o. v., in case of K. T. Seitz v. Pennsylvania Railroad Co. Before MOSCHZISKER, C. J., FRAZER, WALLING, SIMPSON, KEPHART, SADLER and SCHAFER, JJ. Affirmed.

Ejectment. Before KING, P. J.

The opinion of the Supreme Court states the facts.

Verdict for plaintiff. Judgment for defendant n. o. v.

Error assigned, inter alia, was judgment, quoting it.

R. L. Ralston, of *Ralston & Graff*, for appellant.

Harry C. Golden, for appellee.

OPINION BY MR. JUSTICE KEPHART, January 3, 1922:

Plaintiff sues in ejectment to recover the southern part of lot No. 42 in Freeport, Armstrong County; the

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line in dispute is the southern boundary. When the State built the canal through Freeport it condemned and occupied the land necessary for canal purposes, taking part of lot No. 42. The main canal occupied Walnut Alley, the then southern boundary of this lot, and part of the lot. A lock, with masonry sides and wing walls, forming part of the canal, to raise and lower boats, was constructed at the southern end of the lot, and a wasteway, with log and board bottom and sides, was built, extending from the canal above the lock running through the lot and connecting with the basin at the west; the ground between the wasteway and the lock or canal was between 25 and 30 feet wide. The State sold the canal to the Pennsylvania Railroad Company in 1857, and that part of it north of Freeport, extending to Allegheny City, was acquired by the Western Pennsylvania Railroad Company. This latter corporation built a railroad through Freeport over the route of the canal. In 1915 the Pennsylvania Railroad, successors to the West Penn, raised the track through Freeport Borough, and, in so doing, occupied the land claimed to be within its grant,—here in dispute. Plaintiff claims to the line of Walnut Alley where the railroad was originally constructed, at the close of the canal days, and has since been so maintained and used. In the line of title, from the date of condemnation by the State in 1837, the lot has been described as bounded on the south by Walnut Alley or the Pennsylvania canal; in 1843 the disputed line was described “on the south by the Pennsylvania canal,” and in the seven title transfers following until 1853 it reads “on the south by the wasteway of the Pennsylvania Canal. . . . , extending back to the northern margin of the said wasteway”; this was followed in 1861 by a similar description. The partition proceedings later fixed the line as that of the Pennsylvania canal; appellant’s deed calls for Walnut Alley and the West Penn Railroad on the south. The court below permitted a recovery for a part of the land, but,

on a motion for judgment n. o. v., held there was no evidence of title in plaintiff to any of the land, and entered judgment accordingly.

Appellee's title to the land between the wasteway and the southern side of the lock is quite clear; it took, like all other condemnors, land adjacent necessary for the proper enjoyment of the thing condemned, and not only was the wasteway a part of the canal, but also, for the proper maintenance of it, ground sufficient on either side of it was necessarily included in the condemnation so as to preserve the property condemned (*Pennsylvania Canal Co. v. Harris*, 101 Pa. 80, 93); the part in controversy is the small strip, about seven feet by sixty-six feet, between the wasteway and the northern line of defendant's wall.

The evidence did not disclose the exact location of the wasteway, but, when the State built the canal, a dwelling house and store extended from the lock, over the 30 feet of land, partly to, if not altogether over, the wasteway; before 1859 the house was moved back from the wasteway to the northern part of the lot on its present location, facing the canal. Without discussing the description in the various deeds, it was incumbent on appellant to show her southern line, which was defendant's northern line, and, assuming the wasteway was the line, there was no evidence of its location or of any encroachment on her lot that would sustain an award of any part of the land. The wasteway was described as a ditch or dyke to carry water from an upper to a lower level; it ran at right angles with lot No. 42, while defendant's wall cut the lot diagonally. Plaintiff places the distance at seven or eight feet on the east side but cannot give any distance in the center or at the west side. The testimony of Seitz is depended on to show encroachment, and we quote it in full: "Q. Do you know where that wall of the Pennsylvania Railroad Co. is at the present time? A. I do. Q. How far is that from the wasteway or from where the wasteway was formally located? A. Well,

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I could not say how far, the face of the wall is a good bit outside of the wasteway, that is, where it is now. Q. Is the wall further north on lot 42 than where the wasteway was located? A. Oh, yes. Q. About how much further north is it? A. I could not tell the exact distance of that. Q. Did the wasteway cut square across lot 42, or was it cut in a diagonal way? A. It was not a diagonal way. Q. How does the Pennsylvania Railroad Co.'s wall now cut across it, squarely or diagonally? A. I think it cuts it diagonally. Q. About how does it cross, that is, the wall, how does it cross that lot,—at right angles? A. No, it crosses it, or cuts more of it below than it does above. Q. About how far was it from the wasteway at the east line of your lot? A. I could not tell the distance there, but it is quite a distance, some seven or eight feet anyhow. Q. Do you mean that the outside of the line, that is, the north face of the wall, is seven or eight feet from the north edge of the wasteway? A. Yes, sir. Q. How is it in front of your property, about the middle of the lot? A. It runs a little closer to my house now, it takes up a little more room. Q. How far is that point, it, the north face of this wall, from the wasteway? A. I could not figure on that exactly."

Fullerton, plaintiff's witness, who has known the properties during and since the canal days, testified: Q. "How far north of the wasteway would the north side of the wall be from the edge of the wasteway? A. Well, the whole thing would be on it, but I could not tell you exactly the amount of feet,"—indicating that the wall was built on the wasteway. It appears the wall was 123 feet from Market Street, the ground between the lock and the wasteway was 25 to 30 feet, and, if allowance was made for the width of the wall of the lock, the width and walls of the wasteway and the ground between, it would tally very closely with the measurements given by the engineer as to land now occupied by the railroad company. Plaintiff, however, does not defi-

nitely fix the distance the wall is north of the wasteway and does not attempt to locate the latter except in the testimony quoted. The evidence is not sufficient to justify a finding that any part of the land in dispute belonged to appellant. It would be impossible for a surveyor to locate the line of the wasteway with that of the wall, or for a jury to describe the property in a verdict. If satisfactory monuments on the ground could not be described, the purposes for which the land was to be used must be considered as bearing on the quantity of land probably taken. It is impossible to determine what part, if any, of the land described in the writ belongs to plaintiff. The burden rests on her to show title to the thing claimed, or to a definite part of it. This she has failed to do. In *Rodgers v. Pittsburgh, etc., Ry. Co.*, 255 Pa. 462, 466, former Chief Justice BROWN said, "It was contended that in any event there was some space between the foot of such slope and plaintiff's southern property line for which plaintiffs were entitled to a verdict. The court declines to accept this view, since, to recover any such fractional part of the ground described in the writ, the jury must have been able to describe the property for which such a verdict could be rendered, and there was no definite and certain limits fixed in or presented by the plaintiffs' testimony or appearing in the case. To have allowed the jury to pass upon that question would have been asking them to guess at the metes, bounds and area." This language applies with equal force to the present case.

The judgment is affirmed.

**Sakall, Appellant, v. Baltimore & Ohio
Railroad Co.**

Negligence—Railroads—Crossings—"Stop, look and listen"—Contributory negligence—Judgment on record—Act of April 20, 1911, P. L. 70.

In an action against a railroad company for personal injuries sustained at a grade crossing, it is proper to enter judgment on the whole record under the Act of April 20, 1911, P. L. 70, where the evidence shows that at the crossing there were two tracks, that if plaintiff had looked, at a point five feet away from the first track, he could have seen a train approaching on the second track for a distance of 600 or 700 feet, and that if, after crossing the first track safely, he had looked before entering on the second track, he could have avoided the accident.

Argued October 10, 1921. Appeal, No. 17, Oct. T., 1921, by plaintiff, from judgment of C. P. Allegheny Co., Jan. T., 1917, No. 1814, for defendant on the whole record, in case of Steve Sakall v. Baltimore & Ohio Railroad Co. Before MOSCHZISKE, C. J., FRAZER, WALLING, KEPHART, SADLER and SCHAFER, JJ. Affirmed.

Trespass for personal injuries. Before DAVIS, J.

The opinion of the Supreme Court states the facts.

Judgment for defendant on the whole record under Act of April 20, 1911, P. L. 70: 68 Pitts. L. J. 628, opinion by SHAFER, P. J. Plaintiff appealed.

Error assigned was judgment, quoting it.

John P. Egan and *F. C. McGirr*, for appellant.

Allen T. C. Gordon, with him *William Watson Smith*, for appellee.

PER CURIAM, January 3, 1922:

The trial of this case resulted in a disagreement of the jury; defendant moved for judgment on the whole rec-

ord, under the Act of April 20, 1911, P. L. 70, which was granted, and plaintiff has appealed.

The following excerpts from the opinion of the court below correctly disposes of the points involved: "It appears from plaintiff's evidence that Huey Street [in the City of McKeesport] crosses [defendant's] railroad at right angles; the railroad tracks consisted of a siding which came within a few feet of the crossing, but did not go over it; after that, in the direction in which plaintiff was moving, there were three tracks of the Baltimore & Ohio Railroad, the first being for trains going towards Pittsburgh, the second for trains going towards Brownsville, the third a siding, and beyond these were other tracks of the Pittsburgh & Lake Erie Railroad. The account of the accident given by plaintiff and his witnesses is that, when he came to the crossing, the safety gates were up; there were cars standing on the siding on his right, which obstructed his view [in that direction]; he stopped at a point where he could see past the edge of these cars towards Pittsburgh about a hundred feet, and looked and listened; seeing and hearing nothing, he proceeded to cross the tracks. He says that, when he was on the first track, he was looking towards Brownsville; then he kept on going, looking up the Brownsville way, and then turned the Pittsburgh way, and then he was struck. Again he said: 'When I kept on going as I turned the Pittsburgh way, looking, then I got hit.' At a point five feet from the first track, his view was no longer obstructed by the cars standing on the siding, and he had an unobstructed view of the tracks for a distance of six or seven hundred feet in the direction of Pittsburgh. . . . According to the scale of plaintiff's plan, the distance [between the first and second tracks] was eight feet. We have therefore a case in which plaintiff, if he had looked, at a point five feet away from the first track, could have seen the approaching train for a distance of six or seven hundred feet, and if, after crossing the first track safely, he had looked before entering on

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the second track, he would have been in perfect safety so far as the distance between the tracks is concerned. The conclusion is unavoidable that plaintiff entered on the second track without looking on that track until he had stepped upon it, as he practically says was the case; or else, if he looked before he stepped upon it, he failed to see that which was plainly before him and could be seen for many hundred feet.....Plaintiff cannot recover, by reason of his contributory negligence, and that negligence is so plainly manifest, from the evidence, that there is no question for a jury."

The judgment is affirmed.

Thermo Water Lift Co., Appellant, v. Air Tight Steel Tank Co.

Judgment—Opening judgment—Practice, C. P.—Trial without notice to counsel—Discretion—Act of 1915, P. L. 483.

There is no abuse of discretion by the court below in opening a judgment entered on a verdict for plaintiff, in a case begun before the Practice Act of 1915 became effective, where it appears defendant's counsel, believing that the old practice controlled, after filing an affidavit of defense, awaited a rule to plead, and plaintiff's counsel placed the case at issue and proceeded to trial *ex parte*, without defendant's counsel having any notice thereof.

Argued October 11, 1921. Appeal, No. 58, Oct. T., 1921, by plaintiff, from order of C. P. Allegheny Co., July T., 1915, No. 1904, making absolute rule to open judgment, in case of Thermo Water Lift Co. v. Air Tight Steel Tank Co. Before MOSCHZISKEB, C. J., FRAZER, WALLING, KEPHART, SADLER and SCHAFFER, JJ. Affirmed.

Rule to open judgment. Before SWEARINGEN, J.

The opinion of the Supreme Court states the facts.

Rule absolute: 68 Pitts. L. J. 710. Plaintiff appealed.

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Assignment of Error—Opinion of the Court. [272 Pa.
Error assigned, inter alia, was order, quoting it.

Walter Lyon, for appellant.

Harry J. Nesbit, with him *Oliver P. Scaife, Jr.*, for appellee.

PER CURIAM, January 3, 1922:

Plaintiff appeals from an order opening a judgment.

The summons was issued June 5, 1915, and an appearance was entered for defendant. March 6, 1919, statement of claim was filed, and March 20, 1919, defendant put in its affidavit of defense. Counsel for defendant, believing that,—because suit had been entered before the Practice Act of 1915 went into effect,—the old practice controlled, and that the next step would be a rule to plead, awaited such action by plaintiff's attorney, who, however, put the case at issue. Defendant's attorney had no actual notice the case was on the trial list, and no attempt was made by counsel on the other side to inform him when it was called and a jury selected; hence the trial proceeded *ex parte*, resulting in a verdict, May 6, 1920, for \$87,461.63, in favor of plaintiff. The first notice to defendant of the adverse verdict was on May 17, 1920, and four days later, May 21, 1920, within the term, defendant filed its petition to open the judgment, upon which a rule was granted, and subsequently made absolute, the court below saying it would treat the judgment as though "won by default." Under the circumstances, there was no abuse of discretion: *Fuel City Manufacturing Co. v. Waynesburg Products Corporation*, 268 Pa. 441.

The appeal is dismissed.

Porter et al., Appellants, v. Wolf et al.

Will—Changes therein—Oral instructions to executors—Trusts and trustees—Interest in property—Equity.

An oral promise made by executors to testator to carry out certain changes which he desired to make in his will, and which he could not make by a new will or codicil because of his weakened physical condition, is not enforceable as a trust impressed upon testator's property, where the will gives the executors no interest therein.

Argued October 11, 1921. Appeal, No. 70, Oct. T., 1921, by plaintiff, from decree of C. P. Allegheny Co., July T., 1920, No. 1126, dismissing bill in equity, in case of Emily S. Porter et al. v. Mary Malissa Wolf et al., executors of U. M. Morgan, deceased, and James Moody, ancillary administrator c. t. a., of estate of U. M. Morgan, deceased. Before MOSCHZISKER, C. J., FRAZER, WALLING, KEPHART, SADLER and SCHAFER, JJ. Affirmed.

Bill to enforce alleged trust. Before SHAFER, P. J. The opinion of the Supreme Court states the facts. Bill dismissed. Plaintiffs appealed.

Error assigned was decree, quoting it.

Harvey A. Miller, of Miller & Nesbitt, for appellants, cited: Hollis v. Hollis, 254 Pa. 90.

Frank Thomson, of Thomson & Bradshaw, for appellees, cited: Glebus's Est., 267 Pa. 125.

PER CURIAM, January 3, 1922:

The order, sustaining a demurrer and dismissing a bill in equity, appealed from in this case, is affirmed on the following excerpts from the opinion of the court below:

"The bill is against the executors of a testator who was a resident of Ohio, and his ancillary administrator, appointed in [Allegheny] county; it alleges the making of a will in 1913 by testator, one provision of which is that certain of his lands situate in this county should be sold and the proceeds used to erect a family monument, the making of a codicil thereto on June 4, 1917, and that the testator died June 7, 1917. It is then alleged testator, being in a weakened physical condition, desired to change the provision of his will as to the land in Allegheny County and called upon defendants, who were the executors named in his last will, to procure him facilities for changing his will, and that he said to them, in the presence of a number of witnesses, he desired the real estate in Allegheny County to be sold and that three-fourths of the proceeds should be given to certain of his relatives, being plaintiffs in the bill, and one-fourth used for the erection of a tombstone, but, being unable to put the same in writing, he commanded his executors to carry out the changes that he proposed, which they promised to do, and stated that he could rely implicitly on them to carry out his instructions, and, so relying, he allowed the provisions of his will to remain as originally written. The bill prays that defendants may be required to carry out the terms of the trust so alleged to be impressed upon the property. To this defendants have demurred, (1st) that this court has no jurisdiction, inasmuch as the will worked an absolute conversion and, therefore, the exclusive jurisdiction in regard to the will is in the courts of Ohio, and (2d) that the bill shows no trust, but only an effort to alter testator's will by parol. There have been cases in this Commonwealth in which a legatee or devisee has been held to take the property in trust for others, for the reason that he was shown to have procured the bequest or devise to be made on promises to testator, which it would be a fraud on him not to require fulfilled; and it is no doubt in view of such cases the bill has been filed. In

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the present case it does not appear that the executors, whose promises are relied on, took any interest in the land whatever, and therefore, they could not be held to be trustees of it for anyone else. The law of Pennsylvania still requires a will to be in writing, signed by the testator, and, hence, a will cannot be made by having the intended executors or anybody else promise the testator to carry out his wishes orally expressed."

Order affirmed at cost of appellants.

Hamilton et al., Appellants, v. Foster.

Lease—Oil and gas lease—Minerals feræ naturæ—Mines and mining—Contracts—Construction—Duty of lessees—Damages—Burden of proof—Mistake in boring—Injunction—Discretion—Reservation—Royalties—Maxims—Æquitas sequuntur legem.

1. As between the parties to a grant of oil and gas in place, a conveyance thereof is binding and effective, even though they may escape and be lost before being reduced to absolute possession.

2. The fact that water and oil, and still more strongly gas, may be classed as minerals feræ naturæ, does not determine they are not capable of ownership when in place and may not be made the subject of a grant.

3. Oil and gas are minerals, while in place are part of the land exactly like other minerals, and may be leased separate and apart from the surface of the land and from other minerals beneath it.

4. All written instruments relating to a particular kind of business must be construed with due regard to the known characteristics of the business.

5. The fact that there is a distinction, upon questions of interpretation, between an oil and gas lease and other leases, has no relation to the interest or estate conveyed; the dominion of the owner is as absolute over the fluid as over the solid minerals.

6. It is the duty of the lessee in a gas lease to promptly locate and drill wells on the leased property, with due regard to similar operations on adjoining lands.

7. Where by a trespass one obtains possession of property which is his, damages for the trespass cannot be measured by the value of the property.

8. When the lessee of a property and all the gas and oil under it, in good faith and in the belief that he has the right so to do, bores a well at a point forbidden by the lease and obtains gas therefrom, the mistake in boring at that point does not operate to retransfer to the lessor the title to the gas.

9. An injunction will be granted only as a matter of grace in the exercise of a sound discretion, where it will not harm defendant more than it will benefit plaintiff; the rule is otherwise, however, where defendant acts in bad faith, or in a race with the law to accomplish his purpose before injunctive relief can be obtained, in which events the relative benefits and disadvantages ordinarily will not be considered.

10. Where a lease covers a tract of land and grants all the oil and gas under it, but forbids the lessor from boring wells on a part of the tract, this is not a reservation of a right on the part of the lessors to bore a well within the prohibited area. If they attempt to do so an injunction may be granted against them.

11. Where a gas well is drilled by defendant within a prohibited area, and plaintiffs, in consideration of receiving a larger royalty than is provided by the original lease, agree to the drilling therein of a second well, for the purpose of protecting the flow from the first, they cannot retain the excess royalty received from the second well and compel the abandonment of the first.

12. Plaintiff has the burden of proving the amount of damages which he suffers, and these must be measured as of the time when they accrued and not as of a later date when the circumstances are materially altered.

13. *Kelly v. Phillips Gas & Oil Co.*, 262 Pa. 412, cited and distinguished.

Argued October 5, 1921. Appeal, No. 63, Oct. T., 1921, by plaintiffs, from decree of C. P. Allegheny Co., Jan. T., 1920, No. 2314, dismissing bill in equity, in case of Fannie Hamilton and Helen M. Hamilton v. D. A. Foster. Before MOSCHZISKER, C. J., FRAZER, WALLING, SIMPSON, KEPHART, SADLER and SCHAFER, JJ. Affirmed.

Bill in equity for injunction and accounting, and for declaration of trust. Before EVANS, J.

The opinion of the Supreme Court states the facts.

Bill dismissed. Plaintiffs appealed.

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Error assigned, inter alia, was decree, quoting it.

M. W. Acheson, Jr., of Sterrett & Acheson, with him Leonard K. Guiler and Charles Alvin Jones, for appellants.—Plaintiffs are entitled to an injunction: *Kelly v. Gas & Oil Co.*, 262 Pa. 412; *Duffield v. Hue*, 136 Pa. 602.

Oil and gas in the earth as part of the realty belong to the owner of the land, but considered there as distinct from the soil, they do not admit of ownership or conveyance: *Priddy v. Thompson*, 204 Fed. 955; *Jones v. Oil Co.*, 194 Pa. 379; *Hague v. Wheeler*, 157 Pa. 324; *Addleman v. L. & H. Co.*, 255 Pa. 585; *Ohio Oil Co. v. Indiana*, 177 U. S. 190; *Kelly v. Keys*, 213 Pa. 295; *Burgan v. Oil Co.*, 243 Pa. 128, 136; *Superior Oil & Gas Co. v. Mehlin*, 25 Okla. 809; *Huggins v. Daley*, 99 Fed. 606; *Steelsmith v. Gartlan*, 44 L. R. A. 107, 113.

John C. Bane, with him A. M. Simon, for appellee.—Being minerals, oil and gas are parts of the land: *Funk v. Haldeman*, 53 Pa. 229; *Gill v. Weston*, 110 Pa. 312; *Blakley v. Marshall*, 174 Pa. 425; *Ontario Nat. Gas Co. v. Smart*, 19 Ont. R. 591; *Marshall v. Mellon*, 179 Pa. 371; *Stoughton's App.*, 88 Pa. 198.

Oil and gas being minerals, are land; and being land, are transferable by deed: *Clement & Masser v. Youngman & Walter*, 40 Pa. 341; *Blakley v. Marshall*, 174 Pa. 425; *Barnsdall v. Gas Co.*, 225 Pa. 338.

The contention that defendant's claim of title to all the oil and gas to be found under this land is affected by the fact that oil and gas are believed and held to be fugacious, and to move about from place to place, is wholly unsustainable in either law or logic: *Westmoreland, etc., Nat. Gas Co. v. DeWitt*, 130 Pa. 235; *Hague v. Wheeler*, 157 Pa. 324.

OPINION BY MR. JUSTICE SIMPSON, January 3, 1922:

Beginning at least as early as 1907 and lasting until 1920, when this litigation began, the Fidelity Title and

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Trust Company of Pittsburgh had full charge and control of a farm belonging to plaintiffs. It leased and sold portions of the property, divided a part thereof into building lots, collected rents, paid taxes and other charges, and, as "attorneys in fact," sent to plaintiffs, at regular intervals, statements of account, thereafter applying the balances as plaintiffs directed. In a few comparatively trivial things they did not fully agree with the trust company, but such differences were always adjusted before the matter was communicated to others, plaintiffs doing nothing in regard to the property, save by and through the trust company, with whom they advised when requested and at whose instance they executed deeds, leases and other papers. It is not necessary to determine whether the agency arose and was continued because of a letter of attorney given to the trust company by plaintiffs, as remaindermen, and by the then life tenant, who has since died, or was simply the result of a long continued course of conduct; it suffices that the relation existed during the period stated, and that, so far as third parties were concerned, all arrangements in relation to the property were made with the trust company acting for plaintiffs, and not with plaintiffs themselves.

Because much of the property was a continuing expense and not a source of revenue, the trust company, at plaintiffs' request, entered into negotiations with defendant, resulting in a lease, dated October 31, 1918, drawn by it, but executed by plaintiffs and defendant personally, whereby plaintiffs "granted, demised, leased and let unto [defendant] his heirs, executors, administrators and assigns, all the oil and gas in and under all that certain tract of land, and also said tract of land hereinafter described [being most of the farm, including the part laid out into building lots], with covenants of general warranty that [plaintiffs] had the sole right to convey the premises to [defendant], with the exclusive right of drilling and operating thereon for and

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producing oil and gas, and all rights necessary, convenient and incident thereto; such in part as the right to construct and maintain buildings, telegraph, telephone and pipe lines leading from adjoining lands, on and across this leasehold and other lands of [plaintiffs], and similar rights for roadways and the right to use water, oil and gas from the premises for operating purposes.....also the right of subdividing and releasing the whole or any part" thereof, the lease to "remain in force for the term of ten years.....and as long thereafter as oil or gas is produced from the premises or as operations continue for the production of oil and gas." On the margin of the lease is written, *inter alia*: "It is understood and agreed that no wells are to be drilled on the plan of lots laid out upon the portion of the tract covered by this lease."

It will be noted that (with an exception not necessary to consider), this is a grant of all the oil and gas in and under the entire tract, including the plan of lots, and is also a lease of the tract itself; and gave to defendant as plenary powers in the use of the land, and the ownership of the oil and gas under it, as plaintiffs themselves previously had: *Westmoreland Natural Gas Co. v. DeWitt*, 130 Pa. 235, 251-2.

Defendant fully complied with the terms and conditions of the lease. He promptly bored two wells upon the property, each outside of the plan of lots, and obtained from them gas in paying quantities. With the intention of drilling a third well, he cut away some of the trees and thick undergrowth on a hilly part of the farm, at a point which he believed was outside of the plan, but before any boring was done an employee of the trust company informed him this was a mistake. Because of what he had been told, defendant expressed a doubt on the subject, but, rather than have a dispute regarding it, said he would not sink a well there, and would remove the derrick and machinery to another part of the property. The employee suggested, however, it

would be wiser, before doing this, to call upon and advise with the trust officer of the trust company. When he did so, he was informed he could drill the well at the place selected, and, purporting to act under the power of attorney above referred to, the trust officer gave to defendant a letter, referring to the power and to the fact that the proposed well was within the plan of lots and authorizing him to drill at that point. Well No. 3 was then bored, and therefrom gas was obtained in large quantities.

Before this work was begun, the trust company wrote plaintiffs: "The gas men are now boring on two more wells, one up in the woods [being well No. 3] and one up the run near the park line"; but through some oversight failed to definitely advise them of the giving of said letter.

The obtaining of gas in large quantities from this well, caused other land in the vicinity to become valuable for speculative purposes, and the surrounding property was leased to other prospectors, who endeavored to draw the gas away from well No. 3, by drilling others near plaintiffs' line. Fearing the success of such endeavors, and apparently recognizing it was a lessee's duty to locate his wells with due regard to the operations on adjoining lands (*McKnight v. Manufacturers Natural Gas Co.*, 146 Pa. 185, and *Kleppner v. Lemon*, 176 Pa. 502), the trust company, as attorney in fact for plaintiffs, entered into negotiations with defendant for the drilling of another well on plaintiffs' property, within the plan of lots, at a point near the wells on the adjoining tract and so situated as to protect the outflow from well No. 3. A well bored off the plan would not have given the desired security. While these negotiations were pending, the trust company wrote plaintiffs that defendant "has finally offered 1/16 of the gas, if we grant him permission to locate another well on these lots [28 and 29 on the plan]. In the event that a well comes in as large as the other well, [which was well No. 3], our share will be

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nearer \$500 a day than \$500 a year." Following this, an agreement was entered into, signed by plaintiffs and defendant personally, authorizing the latter to sink well No 4 at the point suggested, in consideration of the royalty stated; and when it was drilled gas flowed therefrom in paying quantities, but not of the volume obtained from well No. 3.

Defendant from time to time paid to the trust company the amounts due under the terms of the lease, and the latter remitted them to plaintiffs, specifying in the accounts for which well the rent was paid. Plaintiffs received them not knowing that well No. 3 had been bored within the plan of lots, and, immediately after definitely learning this fact, sent to defendant a check for the amounts paid for it, which he as promptly returned. The matter apparently remains in this shape, plaintiffs having the money and being ready to repay it to defendant. There was no return or offer to return any part of the royalty received from well No. 4.

A few days later plaintiffs filed their bill in equity averring that well No. 3 was wrongfully bored upon the plan of lots, that by reason thereof all the gas derived from it belonged to them and not to defendant, and praying an injunction, an accounting for all gas taken, and an award of damages. An answer was filed denying plaintiffs' right to any relief, the two pleadings setting up the facts substantially as aboveset forth; and, though much testimony was taken at the trial, nothing else of importance was developed.

The court below held that defendant had the right, under the letter given by the trust company to him, to bore the well at the place he did; that an injunction would not be granted in any event, since it would do more harm than good; and that as the gas under the whole of the tract, including that under the plan of lots, had been expressly granted to him, the utmost plaintiffs could recover would be such damages as they suffered by reason of the location of the well on that plan, and as

none had been proved nothing could be awarded. A final decree dismissing the bill was thereupon entered and plaintiffs appealed.

In our opinion the decree is right. Much of the difficulty, under which appellants labor, would be removed if they did not attempt to extend the comparison made in *Westmoreland Natural Gas Co. v. DeWitt*, 130 Pa. 235, 249, far beyond the purpose for which it was intended. It was there said: "Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *feræ naturæ*." The analogy is not too fanciful, when understood in the sense in which the words were used, as appears in the next sentence: "In common with [wild] animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner"; but the first statement, whether or not qualified by the second, does not determine that oil and gas are not capable of ownership even when in place, or may not be the subject of a grant. On the contrary, in this State these matters are firmly established otherwise.

It has been many times decided that oil and gas are minerals, though not commonly spoken of as such, and while in place are "part of the land" (*Kier v. Peterson*, 41 Pa. 357, 362; *Funk v. Haldeman*, 53 Pa. 229, 249; *Stoughton's App.*, 88 Pa. 198, 201; *Marshall v. Mellon*, 179 Pa. 371, 374); like other minerals within the bounds of the freehold (which extends to the centre of the earth: *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286, 295), they may be the subject of sale (which is precisely what in legal effect this lease accomplishes: *McIntosh v. Ropp*, 233 Pa. 497, 512), separate and apart from the surface and from any other minerals beneath it. This being true,—and it is not disputed by appellants,—like all other minerals they necessarily belong to the owner in fee or his grantee, so long as they remain part of the property, and though he cannot use them until he has severed them from the freehold, exactly as in the case of

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all other minerals beneath the surface, he nevertheless has an ownership which he can sell and which otherwise he will lose only by their leaving the property.

It is of course true that there is a distinction, upon questions of interpretation, between an oil and gas lease and an agricultural and even a coal lease (*Wettengel v. Gormley*, 160 Pa. 559; *Kleppner v. Lemon*, 176 Pa. 502; *Burgan v. South Penn Oil Co.*, 243 Pa. 128), the reason being that leases, like all other instruments relating to a particular business, must always be construed with due regard to the known characteristics of the business (*McKnight v. Manufacturer's Natural Gas Co.*, 146 Pa. 185, 200); but "there is no difference [between them] as respects the interest or estate conveyed" (*Prager's Estate*, 74 Pa. Superior Ct. 592, 595); and, as to the owner in fee and his grantees, their "dominion is, upon general principles, as absolute over the fluid as over the solid minerals. It is exercised in the same manner and with the same results": *Hague v. Wheeler*, 157 Pa. 324, 341.

But it is said that defendant's act in boring the well within the plan of lots was a trespass and hence no title could be acquired. For the sake of the argument both those claims may be conceded and yet plaintiffs will not have advanced a step along the road to the relief they ask. In the present case the title to the gas as between plaintiffs and defendant was vested in him by the lease, subject only to be divested through the action of natural laws which did not operate here. Therefore we do not have to decide whether or not a title can be acquired by a trespass, but at the most what recovery can be had against one who, by a trespass, obtains possession of his own property; and certainly this cannot be measured by its value. True, an injunction may be granted if the trespass threatens to be a continuing one, but in the instant case this rule does not apply for the reasons hereafter stated.

The decision of the main question is, therefore, free from difficulty. As between plaintiffs and defendant,

the grant of all the gas under the entire tract was as absolute as it would have been if the subject-matter had been of any other mineral below the surface, or of standing timber upon it. True, it might not all be reduced to absolute possession during the term of the lease, and hence, when it ended, that which was not taken would revert to the ownership of plaintiffs; but this rule would also apply to other minerals and to standing timber, in each case for the same reason.

If plaintiffs themselves had sunk well No. 3, at the exact spot where it now is, the act would have been a wrongful one (*Lynch v. Burford*, 201 Pa. 52; *Brown v. Spilman*, 155 U. S. 665), all the gas obtained would have been defendant's, because of the grant to him of "all the oil and gas in and under" the entire tract, and plaintiffs would have been required to account to him for its value. It necessarily follows that when, in good faith and in a belief that he had the right so to do, he bored the well at that point, and thereby obtained the gas, he but reduced to possession that which plaintiffs had granted to him, and therefore, since he secured it during the term of the lease, this cannot result in re-transferring the title to them.

Nor did the court below err in refusing to grant an injunction. This writ is of grace, in the exercise of a sound discretion, and not of right; is ordinarily only preventive in its nature and not restorative; and will not be issued where it will harm a defendant more than it will benefit a plaintiff, and certainly never where, as here, plaintiffs would probably lose more than they would gain. Had defendant bored well No. 3 in bad faith, or in a race with the law to accomplish his purpose before injunctive relief could be obtained, the chancellor doubtless would have issued the writ; for, under such circumstances, his conscience is too tender to permit a defendant to derive any advantage from his acts, even though it is difficult to see how plaintiffs would be benefited. It was upon the first of these grounds we

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sustained the injunction in *Kelly v. Phillips Gas & Oil Co.*, 262 Pa. 412, where indeed the lessor did not grant the oil and gas under the tract, but only a right to search for it; reserved "the free use and enjoyment of the premises except the parts necessary for drilling and operating"; the defendant in bad faith "entered upon the prohibited area, with full knowledge of the fact it was so doing, and was not induced either to begin or to continue the operation of drilling this well by any act or conduct on the part of the plaintiff," who lived upon the property and was, therefore, injured by the work being done in close proximity to his dwelling. In the present case, however, the court below properly found that defendant acted in good faith, under written authority from those left by plaintiffs in charge of the property, and this is a potent factor even if the trust company exceeded the powers given by the letter of attorney.

Appellants' claim to this character of relief is based largely upon their alleged inability to give to defendant a title to the gas, because of its fugitive nature, no matter what would be the natural construction of the language used in the lease; and for that reason, they say, he has no right to take it and ought to be enjoined from so doing. We have already answered this contention, and need only add that if there can be no ownership until the gas is reduced to actual possession, then plaintiffs themselves have no ownership, for it is as fugitive in their case as it is in his, and hence they have no standing to complain because he gets it. Perhaps this conclusion demonstrates, as effectively as any argument could, the fallacy of their contention that, as between the parties themselves, there could be no grant of ownership of the gas because of its fugacious character.

The inequity of granting an injunction is apparent when the matter is viewed from another standpoint. It is a well-known fact that oil and gas may be readily drawn from one part of the underlying field to another (*Kleppner v. Lemon*, 176 Pa. 502; *Burgan v. South Penn*

Oil Co., 243 Pa. 128; Highfield Co. v. Kirk, 248 Pa. 19), and therefore a lessee in such cases must act with great promptness in sinking and due care in selecting the place to bore a well, lest others are drilled on adjoining property (and in this territory there are many others already in operation), which will exhaust the gas to the detriment of the lessor. It follows that the drilling of well No. 4, at the point in lots 28 and 29 was a wise act, and the purpose to be conserved thereby, namely, the protection of well No. 3, was a proper purpose. Plaintiffs, however, cannot have the benefit of the excess royalty paid by defendant, because of the necessity for this protection, without affirming defendant's right to place the well where it is. If its use was enjoined, in all probability either all the gas now secured through it would go to the wells on other properties, or partly there and partly to well No. 4, or wholly to the latter; these last-named contingencies being one of the reasons, asserted in the bill in equity and in appellants' printed argument, why an injunction should be granted. If the gas all went to other properties both parties would lose, and this possibility alone would give the chancellor much pause. In either of the other events plaintiffs would get a larger sum for the gas they granted to defendant than by the lease they were entitled to have, simply because it came through well No. 4, though it was drilled for the express purpose of protecting the flow from well No. 3, and the larger payment was agreed upon because it would probably effect this purpose.

Plaintiffs, of course, had and have the privilege of refusing to accept any real and immediate advantage, and to stand on their strict legal rights, preferring a possible future gain, however remote, speculative and imaginary, it may be; but they can hardly expect a chancellor to follow them into this realm, to the injury of themselves and a still greater injury of defendant, who in good faith expended a large sum of money in drilling these two wells for their joint account. It is true, as the event

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happened, defendant made a large profit from well No. 3, but the law cannot deprive him of the benefit of this bargain, any more than it can take from him anything else that is his, and a court of equity can go no further in this respect: *æquitas sequitur legem*. Had no gas been obtained, doubtless plaintiffs would be unable to see any equity in a claim that they suffer a part of the loss; that a gain resulted in which they have shared and are sharing stands in the way of their present contention, which in effect is that they are not only entitled to keep the enhanced royalty heretofore derived from well No. 4, but to increase it by destroying well No. 3, whereas, as already stated, the former would not have been drilled, or the larger royalty agreed upon, but for the purpose of protecting, for joint benefit, the flow from the latter.

Nor are plaintiffs in any better position on the question of damages. Having elected to claim them in this suit, plaintiffs had the burden of proof of establishing the amount thereof; they made no attempt to do this and when defendant proposed to show what would have been a proper royalty, the offer was overruled because of their objection that it was irrelevant and immaterial.

The quantity of gas derived from well No. 3 could not measure plaintiff's damages, if any, not only for the reasons already stated, but because also it might all have been obtained by defendant (as indeed he testified it could, and no one contradicted him), through wells bored outside of the plan of lots, during the indefinite period he was entitled, under the lease, to retain possession for this purpose; and therefore a decree for an accounting would not have been an appropriate order. The hint that plaintiffs might be entitled to receive, as a royalty, the same proportion of gas subsequently provided for in the agreement relating to well No. 4, cannot be sustained, for the situation had seriously altered between the time well No. 3 was drilled and the date of this agreement. As a result of the great volume of gas obtained from well No. 3, landowners were justified in de-

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manding much more than was theretofore obtainable. Moreover, as already stated, defendant gave an increased royalty in order to protect the flow from it, and hence, if plaintiffs' contention was sustained, we would have the anomaly of defendant paying for the gas obtained from well No. 3, what he was willing to pay to protect this gas itself, not what the royalty for No. 3 was otherwise worth.

The decree of the court below is affirmed and the appeal is dismissed, at the cost of appellants.

Rankin et al. v. Ward Baking Co., Appellant.

Negligence—Automobiles—Infant near school house—Crossings—Contributory negligence—Conflicting evidence—Case for jury—Evidence of negligence from accident—Res ipsa loquitur.

1. It is the duty of a driver of an automobile to have his car under such control at street intersections as to be able to stop at the shortest possible notice.

2. For a motor vehicle to run down a pedestrian who is in full view and does not suddenly change his course, is evidence of negligence.

3. There may be negligence in failing to have a motor vehicle under proper control, without excessive speed.

4. The tendency of small children to run across streets, especially at or near school houses, must not be ignored by drivers of motor vehicles.

5. As a pedestrian may lawfully cross a street at any point, the fact that he crosses in the middle of the block, will not in itself charge him with contributory negligence.

6. In an action to recover for injuries to a child, six years old, run down by a motor truck near a school house, the case is for the jury where the evidence is conflicting, as to whether or not the child was at a street intersection, and as to whether or not she darted out from behind a trolley car.

Negligence—Injuries to minor child—Damages—New trial—Discretion of court—Abuse—Appeal.

7. In an action to recover damages for injuries to a minor child six years old, a verdict for \$2,500 for the father, is not excessive,

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where it appears that his expenses, by reason of the accident, amounted to over \$900.

8. Nor is a verdict for \$10,000 for the child necessarily excessive, where it appears that her leg was crushed, that she was confined to the hospital for five months, and that there would be an arrested growth of her leg with permanent deformity and disability.

9. The lower court's refusal of a new trial in such case is not an abuse of discretion so as to call for reversal on appeal.

Argued October 10, 1921. Appeals, Nos. 23 and 24, Oct. T., 1921, by defendant, from judgments of C. P. Allegheny Co., April T., 1920, No. 2615, on verdicts for plaintiffs, in case of Florence Rankin, a minor, by her next friend and father, Thomas W. Rankin, and Thomas W. Rankin, in his own right, v. Ward Baking Company. Before MOSCHZISKER, C. J., FRAZER, WALLING, KEPHART, SADLER and SCHAFFER, JJ. Affirmed.

Trespass for injuries to child. Before STONE, J.

The opinion of the Supreme Court states the facts.

Verdict and judgment for Florence Rankin for \$10,000, and for Thomas W. Rankin for \$2,500. Defendant appealed.

Errors assigned were (1) refusal of new trial; (2) refusal of binding instructions for defendant and (3) refusal of judgment for defendant n. o. v., quoting record.

W. Clyde Grubbs, for appellant.—There was no case for the jury: *Holden v. R. R.*, 169 Pa. 1; *Kohler v. R. R.*, 135 Pa. 346; *Maloy v. Rosenbaum Co.*, 260 Pa. 466.

The verdicts were excessive.

H. Fred Mercer, for appellees.—The case was for the jury: *Mulhern v. Bread Co.*, 257 Pa. 22; *Silberstein v. Showell Fryer & Co.*, 267 Pa. 298; *Schoepp v. Gerety*, 263 Pa. 538; *McMonagle v. Simperts*, 267 Pa. 117.

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The verdict was not excessive: Willenpart v. Elevator Co., 269 Pa. 131.

OPINION BY MR. JUSTICE WALLING, January 3, 1922 :

This action is for injuries to a minor child. On November 10, 1919, Florence Rankin, while crossing Franklin Avenue, Wilkinsburg, on her way to school, was struck and seriously injured by one of defendant's auto-trucks. Verdicts were rendered for father and daughter and, from judgments entered thereon, defendant brought these appeals.

Franklin Avenue extends east and west at the width of 50 feet, with a paved cartway, 30 feet wide, in the center of which is a double track street railway, the one to the south being eastbound. Between the track and the curb is an open space of eight feet on each side. The Johnson public school is on the south side of the avenue, and 357 feet to the west thereof a very narrow street called Elvia Way intersects the avenue from the north, as does another street between that and the school house. At about one o'clock on that day, as the minor plaintiff, then six years of age, accompanied by another small girl, was going north across the avenue she was knocked down and run over by defendant's truck, which was traveling westerly in the north street railway track. There was a sharp conflict in the evidence, that for plaintiff being to the effect that the accident was at the intersection of Elvia Way, which the truck approached without warning, and ran down the child who had been in full view of defendant's chauffeur while he drove the truck for more than two hundred feet; also that he did not have the truck under proper control or give the attention the situation demanded. It is the duty of the driver to have his car under such control at street intersections as to be able to stop at the shortest possible notice: Anderson v. Wood, 264 Pa. 98. For a motor vehicle to run down a pedestrian, who is in full view and does not suddenly

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change his course, is evidence of negligence: *King v. Brillhart*, 271 Pa. 301; *Petrie v. Myers*, 269 Pa. 134; *Reese v. France*, 62 Pa. Superior Ct. 128. There may be negligence in failing to have the motor vehicle under proper control, without excessive speed: *Anderson v. Wood*, *supra*; *Schoepp v. Gerety*, 263 Pa. 538.

The evidence for defendant located the scene of the accident 125 feet east of Elvia Way, denied the lack of warning or any neglect on part of the chauffeur and attributed the accident to the sudden darting of the children from behind a moving eastbound trolley car. The chauffeur says he saw little children on the walks but did not look on the south side of the avenue after passing the school; also that he applied the brakes when he first saw the two girls and stopped the truck in twenty-five or thirty feet, while plaintiffs' evidence is that it ran much further and that there was no trolley car to obstruct his vision.

The trial judge told the jury plaintiffs could not recover if the little girls darted out in the path of the truck when too late for the chauffeur to avoid the accident, but declined to give binding instructions for defendant. To have done so would have been manifest error, as plaintiffs were entitled to go to the jury on their evidence, although strongly contradicted: *Williams v. Phila. R. T. Co.*, 257 Pa. 354. The decided preponderance of the evidence is that the accident happened east of Elvia Way and, if the case turned wholly on that question there would be much force in defendant's contention that the refusal to grant a new trial was an abuse of discretion; but a pedestrian may lawfully cross a street at any point (*Anderson v. Wood*, *supra*; *Lamont v. Adams Express Co.*, 264 Pa. 17), so the fact that the accident occurred in the middle of the block would not be decisive. The tender age of the minor plaintiff excludes the defense of contributory negligence and the tendency of small children to run across streets, especially at or near schools, must not be ignored by the

drivers of motor vehicles: see *Silberstein v. Showell, Fryer Co.*, 267 Pa. 298. According to defendant's evidence, the girls left the south curb after the trolley car had passed and, if so, the minor plaintiff went about eighteen feet and her companion, who escaped injury, at least twenty-two feet before the accident. Assuming the accuracy of that evidence, as it was a bright day with a dry track, it was still for the jury to find whether the chauffeur, in the exercise of due care, might not have avoided striking the child: see *McMonagle v. Simpers*, 267 Pa. 117.

The expense of the child's injuries to the time of trial amounted to over \$900; therefore, the verdict of \$2,500 for the father cannot be regarded as excessive. The verdict of \$10,000 for the minor plaintiff is not so large as to shock the judicial conscience, considering the nature and extent of her injuries (*McMonagle v. Simpers*, *supra*; *Willenpart v. Otis Elevator Co.*, 269 Pa. 131), for, in addition to other bruises and contusions, her right leg was crushed between the knee and the ankle, causing a compound fracture of the large bone; septic poison resulted, she was confined in the hospital nearly five months and the wounds had not entirely healed at the time of trial, eleven months after the injury. The leg is somewhat shortened, is surrounded by scar tissue and smaller than the other. The evidence of the experts differs as to what the final outcome will be, that for plaintiffs indicates an arrested growth of the leg with permanent deformity and disability. The jury apparently so found, and the lower court's refusal of a new trial was not such an abuse of discretion as to call for our interference.

The assignments of error are overruled and the judgments are affirmed.

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Syllabus—Statement of Facts.

Shrut v. Huselton et al., Appellants.

Vendor and vendee—Sale of real estate—Specific performance—Tender of purchase money—Time when essence of contract—Consideration—Sale of wife's real estate—Husband's participation in sale—Statute of frauds—Quitclaim deed.

1. Where a vendee of land meets the vendor at the time and place mutually agreed upon for settlement, and the vendee, without actually displaying the money, says that he has it and is prepared to go on with the settlement, and the vendor declines so to do, not on the ground that the money was unproduced, but for other reasons, the vendor cannot thereafter refuse to convey the land to the vendee because the latter failed to tender the cash at the date fixed for settlement.

2. Where a contract for the sale of land provides for assumption of a mortgage on the premises, and the balance in cash, and the vendor subsequently orally agrees to accept a judgment note in lieu of a portion of the cash, and at the settlement refuses to accept the note, and demands the cash, while the vendee might not be able to enforce the new agreement, for lack of consideration, the vendor will be estopped from setting up the vendee's failure to produce the entire balance in cash, as a cause for rescinding the contract.

3. Under the facts of this case, time was not of the essence of the contract.

4. Where a wife executes a contract for the sale of her land, in which her husband does not join, but husband and wife execute a deed for the land, which is submitted to the vendee and approved by him, but not delivered, the husband cannot thereafter, all the parties being alive, set up the statute of frauds as a defense against specific performance of the contract.

5. Where vendors wrongfully violate an agreement of sale of real estate, and convey the land to another, and such grantee is joined with the vendors as defendants in a bill for specific performance, the court in entering a decree against the defendants, should require the second grantee to execute simply a quitclaim deed and not a deed of general warranty.

Argued October 11, 1921. Appeal, No. 96, Oct. T., 1921, by defendants, from decree of C. P. Allegheny Co., April T., 1920, No. 617, on bill in equity, in case of Jacob

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Shrut v. M. Laverne Huselton and S. H. Huselton, her husband, and *Harry Gillman and Rebecca Gillman*, his wife. Before *MOSCHZISKE*, C. J., *FRAZER*, *WALLING*, *KEPHART*, *SADLER* and *SCHAFER*, JJ. Affirmed, with modified decree.

Bill in equity for specific performance. Before *DREW*, J.

The opinion of the Supreme Court states the facts.

Decree for specific performance. Defendants appealed.

Error assigned, inter alia, was decree, quoting it.

A. E. Anderson, with him *Charles S. Crawford*, for appellant.—A vendee before suing for specific performance on his equitable title, either at law or in equity, must tender the purchase money in accordance with the contract: *Nulton's App.*, 103 Pa. 286; *Salmon v. Rance*, 3 S. & R. 311; *Hughes v. Antill*, 23 Pa. Superior Ct. 290; *Appleton v. Donaldson*, 3 Pa. 381.

The acts of plaintiff in offering the second mortgage and then the judgment note amounted to a counter-proposal and a rejection of the contract: *Henry v. Black*, 213 Pa. 620.

The wife's contract, unlike that of her husband, conveys no interest in the land, legal or equitable, but creates a personal liability only: *M'Coy v. Niblick*, 221 Pa. 123, 128.

Where parties by their agreements or covenants have deliberately fixed a time for the performance of an act, a court of equity will be cautious to act in disregard of it, and in effect change the contract which the parties have made: *Doughty v. Cooney*, 266 Pa. 337; *Van Kirk v. Patterson*, 201 Pa. 90; *Sylvester v. Brown*, 132 Pa. 467; *Remington v. Irwin*, 14 Pa. 143; *Irwin v. Bleakley*, 67 Pa. 24; *Hatton v. Johnson*, 83 Pa. 219.

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A. E. Kountz, for appellee, cited: *Tripp v. Bishop*, 56 Pa. 424.

OPINION BY MR. CHIEF JUSTICE MOSCHZISKEE, January 3, 1922:

Plaintiff, Jacob Shrut, sued in equity to enforce specific performance of a contract for the sale of real estate, which he had purchased from M. Laverne Huselton, the wife of S. H. Huselton, and which they, instead of conveying to him, had deeded to Harry Gillman; all of whom, with Rebecca Gillman, the wife of the last mentioned, are defendants. After a hearing on bill, answer and proofs, a decree was entered in favor of plaintiff, and defendants have appealed.

The chancellor found: that, on November 17, 1919, the first named defendant agreed in writing to convey the property in controversy to plaintiff, on or before December 1, 1919, upon payment by the latter of \$11,125; \$100 was paid down as hand-money, and the agreement stipulated that a mortgage for \$7,000, then on the property, should be assumed by the purchaser, the balance to be paid in cash at time of settlement; the agreement was not signed by the husband of the vendor, although he took part in negotiating the sale and was present at the execution of the contract; subsequently, all parties in interest, by mutual consent, fixed December 4, 1919, at the office of the vendor's husband, in Pittsburgh, as the time and place of settlement, and they agreed that the vendee might give, and the vendor would accept, a sixty-day judgment note for \$500, in lieu of that amount in cash; when the day of settlement arrived, December 4, 1919, the parties met at the appointed place, Huselton representing his wife, who was too ill to attend, and, after existing leases had been duly transferred in writing to the vendee, and a properly executed deed, signed and acknowledged by the vendor and her husband, had been exhibited to and approved by the vendee and his attorney, the latter having deposited on the table, where

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the settlement was taking place, a certified bank check for part of the consideration, a certain amount in cash, and the aforementioned judgment note for the balance, Huselton, while raising no question about the certified check, refused to accept the judgment note, saying his wife was not willing to take it; after some talk, the vendee and his attorney, together with the real estate agent who had put through the deal, left the office, but returned in a few minutes with cash, to make up the amount of the note previously refused; the vendee informed Huselton that he was prepared with the cash to make settlement, but the former declined to go on, saying he was too busy to be bothered with the matter and would have to see his wife before doing anything more; on either the following evening, or that of the next day, the vendee, accompanied by George W. Jessup, the real estate agent, appeared at the home of the vendor with the full amount of the consideration, above the \$7,000 mortgage, in actual cash; they saw Huselton, his wife being too ill to appear, and tendered him the cash, asking for a settlement, which tender and request were rejected; on December 18, 1919, the Huseltons conveyed the premises in controversy to Gillman, for an advanced price, although the latter had been formally notified, on the previous day, of Shrut's claim to the property.

Appellants, by exceptions in the court below, questioned the finding of the chancellor, urging, among other things, that no cash tender had at any time been made by actually displaying the money to vendor or her agent, S. H. Huselton. In reply to this, the court below very properly remarks that, when Shrut brought the money to Huselton, saying he had it and was prepared to go on with the settlement, and the latter declined so to do, not on the ground that the money was unproduced, but, for other reasons, "He placed himself and his wife, for whom he acted as attorney in fact, in a position where they cannot deny that full tender was made." Since no special consideration appears for vendor's agreement to

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accept the \$500 judgment note in place of cash, we may add, vendee might not be in a position to enforce that understanding; nevertheless, after making such agreement, the vendor would be estopped from setting up the vendee's failure to produce the \$500 in cash at the first meeting for settlement, as a cause for rescinding the contract. Moreover, there is nothing in the written contract to indicate time was of the essence of the agreement, so far as the date of settlement is concerned, and the mere fixing of December 4th, as a mutually convenient date for settlement, would not make that day of the essence of the contract, under the circumstances of this case; had the vendor so intended, it was her duty, when she changed her mind about taking the judgment note, to have forthwith fixed a definite date for the vendee to appear with the proper amount in cash, or, failing in that, she must have allowed a reasonable time. It is not necessary to further discuss this phase of the case, however, for, as before said, the tenders made by the vendee were sufficient, on the facts here involved.

Although the original contract was not executed by vendor's husband, the deed, which was signed and acknowledged by him, as well as his wife, having been produced to the vendee and approved as acceptable to the latter, all the parties to the transaction being alive, was a sufficient memorandum in writing to satisfy the Pennsylvania Statute of Frauds (*Tripp v. Bishop*, 56 Pa. 424, 428, 429); and the court below did not err in so deciding.

After an examination of the entire record, including a careful reading of the testimony, we are not convinced of reversible error in any particular, although the final disposition of the case, made by the court below, calls for modification.

The decree is affirmed, except in so far as it directs Harry and Rebecca Gillman to join in a general warranty deed; nothing more than a quitclaim deed is required from them; and it is directed that, upon return

of the record, the court below shall forthwith fix a time for hearing, to determine the indebtedness of Gillman to plaintiff for the use and occupation of the premises in controversy, so that all funds deposited in court, above the amount of that liability, may be released from impoundment at an early date; to such extent, the decree is modified. The costs are to be paid by M. Laverne Huselton.

Pittsburgh Forge & Iron Co., Appellant, v. Dravo Contracting Co.

Negligence—Statement—Evidence—Allegata and probata—Amendment—Surprise—Waiver—Continuance—Appeal—Proximate cause—Fire—Oil on river—Spreading fire by wind—Intervening independent agency—Things to be naturally anticipated—Act of God or vis inertia.

1. In an action to recover damages for the destruction of plaintiff's wharf by fire, where the statement of claim charges negligence in permitting a burning board to be placed in a river covered with oil which was "being carried thence down the river and along and past plaintiff's property," and that defendant knew or should have known that the current of the river was carrying the oil down and along plaintiff's property, it is error for the trial judge, after admitting evidence, against objection, that the oil before the fire extended from defendant's operation to and past plaintiff's wharf, to instruct the jury to disregard such evidence as not in accordance with the statement of claim.

2. The ruling of the judge admitting the evidence was equivalent to an amendment of the statement; and, if defendant was not prepared to meet the issue in that form, it should have pleaded surprise, and asked a continuance; it is too late to raise that objection on appeal.

3. In such case, the fire resulting from the throwing of the burning board on the oil, the result must have been foreseen not only to be possible but probable and natural, to make defendant liable.

4. An instruction that no recovery could be had unless the current carried the fire to the plaintiff's wharf and such a result was naturally to be foreseen, is erroneous in view of evidence that the

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body of oil was continuous between the point of defendant's operation and plaintiff's wharf.

5. It was also error to charge, in the absence of testimony of unusual wind conditions, that defendant was not bound to anticipate the action of the air currents, and if the fire was so conveyed, this would constitute an intervening independent agency which would relieve from liability.

6. The ordinary danger of wind helping a fire to spread is one of the things to be naturally anticipated.

Negligence—Damages—Insurance.

7. Ordinarily the amount for which property is insured does not, in an action for its destruction by fire, afford a test of value, of sufficient probative effect to be admissible.

Appeals—Evidence—Exception.

8. Where no exception was taken to the admission of evidence at the trial, no objection to its admission can be made on appeal.

Argued October 10, 1921. Appeal, No. 187, Oct. T., 1920, by plaintiff, from judgment of C. P. Allegheny Co., Jan. T., 1919, No. 474, on verdict for defendant, in case of Pittsburgh Forge & Iron Co. v. Dravo Contracting Co. Before MOSCHZISKE, C. J., FRAZER, WALLING, KEPHART, SADLER and SCHAFFER, JJ. Reversed.

Trespass for damages to property by fire. Before MACFARLANE, J.

The opinion of the Supreme Court states the facts.

Verdict and judgment for defendants. Plaintiff appealed.

Errors assigned were various rulings and instructions, sufficiently appearing by the opinion of the Supreme Court, quoting record.

Thomas Patterson, of Patterson, Crawford, Miller & Arensberg, for appellant.—The court erred in its application of the pleadings to the evidence: Fisher v. Life Assn., 188 Pa. 1.

The court erred in charging that no recovery could be had unless it was the current which carried the fire

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down and unless defendant should have anticipated that after the fire started the current would carry it and the burning oil to the wharf.

The court erred in its charge with reference to the wind.

George C. Wilson, of *Wilson & Evans*, for appellee, cited: *Hoag & Alger v. R. R.*, 85 Pa. 293; *Penna. R. R. v. Kerr*, 62 Pa. 353.

OPINION BY MR. JUSTICE SADLER, January 3, 1922:

The plaintiff's manufacturing plant is located in the City of Pittsburgh on the Ohio River, having a frontage thereon of approximately 1,350 feet, and along it for a considerable distance a wharf was built. Immediately above is the land of the Pressed Steel Car Company, where the defendant was engaged in constructing a concrete embankment. Wooden frames were used in the work, and, when the cement had sufficiently dried, the supporting boards were thrown upon the bank and burned. This was done on July 22, 1918, at a point between 300 and 400 feet above plaintiff's property. On the morning of that day, a large quantity of oil was observed upon the surface of the river, extending out for 200 feet or more, and covering the water continuously to a point about half way along the property of appellant. So unusual was the condition that the superintendent of the defendant was led, several hours before the fire, to make investigation of the cause. Subsequent to the accident, it was discovered that a broken pipe line, traversing the river bed, was responsible. The employees of the defendant were using a steam bucket for the movement of materials, and lifted a burning stick, variously estimated as to size, from the fire on the bank, intending to place it farther back. In swinging the timber over the water it fell upon the surface or was lowered therein. The result was a serious conflagration and the ensuing

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fire was carried over the pool of oil to the wharf of the plaintiff, causing its destruction.

The statement of claim charged negligence in permitting a burning board to be placed in the river, covered as the latter was with oil, which was "being carried thence down the river along and past the plaintiff's property," and that the defendant "knew, or should have known, that the current of the river was carrying said oil down said river along the plaintiff's property and wharf, and that, if said oil caught fire, great damage would result." These quotations are necessary to a proper understanding of one of the complaints here made by appellant. Upon the calling of the first witness, an offer was made to show that the oil extended in an unbroken stream from the defendant's operation to and along a considerable portion of the wharf destroyed. Against the objection of defendant that the declaration merely charged the setting on fire, in front of the dredge, of the oil, which was then carried down by the current, and not that the surface was covered with the combustible material to the wharf, the evidence was received. Subsequent offers during the trial were objected to on the same grounds, and overruled.

The learned court below was of the opinion that the allegation of a continuous body of oil "along and past" the wharf was sufficient, and allowed plaintiff to submit his proofs to establish this fact; and in so doing we think there was no error. The wording used sufficiently indicates the contention of the plaintiff to justify the admission of supporting testimony. Had the defendant been taken unawares, surprise could have been urged, and probably a continuance obtained. This was not done, and the trial lasted four days, with much evidence received on both sides to show the surface condition of the river at the time of the fire. When the case was closed, the court reversed its previous ruling, and suggested that an amendment to the statement must be made, if the testimony received was to be considered; in which case,

it advised, a continuance would be granted if insisted upon by defendant. Plaintiff, urging that the declaration was sufficiently broad, declined to apply for an amendment, and the evidence was withdrawn by the court from the jury. Assignments of error complain of this action, and, we think, with reason.

A careful examination of the statement leads to the conclusion that the ruling first made was justified. Even if indefinite, the trial was had with the approval of the court on the theory of the plaintiff. What was said in *Fisher v. Life Association*, 188 Pa. 1, 11, applies with equal force to the present situation: "The suggestion that the allegata and probata do not agree is without force. . . . While the plaintiff's statement omitted some of the terms of the contract as claimed by the defendant, it was the fault of the latter that it did not take advantage of their omission at the proper time, if they were deemed essential. The ruling of the learned judge was equivalent to an amendment of the plaintiff's statement, and it will be so treated here. If the defendant was not prepared to meet the issue in that form it should have pleaded surprise and asked a continuance. It is too late now to raise this objection." There is nothing in the Practice Act of 1915, which makes necessary the modification of the rule as thus expressed by Chief Justice STERRETT.

In view of the fact that a retrial must be had, we shall not attempt to rule specifically on each of the twelve assignments, but will refer only to such additional matters as seem necessary to a proper understanding of what we deem to be the applicable principles of law. It is needless to cite authorities to show that defendant was not responsible for the loss which occurred, unless the negligence of its employees was the proximate cause of the loss. The consequence of the throwing of a burning timber on the oil must have appeared not only to be possible, but probable and natural: *S. S. Pass. Ry. Co. v. Trich*, 117 Pa. 390; *Behling v. Pipe Lines*, 160 Pa. 359;

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Scott v. Ry. Co., 172 Pa. 646. "A proximate cause, in the law of negligence, is such a cause as operates to produce particular consequences without the intervention of any independent unforeseen cause without which the injuries would not have occurred": Bruggeman v. York, 259 Pa. 94, 97. It is only when the facts show a continuous succession of events so linked together that they become a natural whole, not broken by some outside agency, that the result is to be considered as the natural one: Howarth v. Adams Express Co., 269 Pa. 280. A discussion of the rule to be applied in cases such as the one before us, with careful comment on the earlier decisions, is found in Gudfelder v. Ry. Co., 207 Pa. 629, and a repetition of what is there said is needless here.

The jury was told that no recovery could be had unless the current carried the fire to the plaintiff's wharf, and that such a result was naturally to be foreseen. In so instructing, the court had in mind the limited view of the statement of claim, as already noted, and withdrew from consideration the evidence which indicated a solid body of oil from the point of the alleged negligent act to the wharf which was destroyed. It might well be a jury would find that the carrying of the fire to the property of the lower riparian owner was a mere possibility, and not a probability, but would take an entirely different view if the body of oil was continuous between the two points, being aware of the physical fact that the whole pond of combustible material would likely be consumed before the conflagration would cease.

Again, the jury was told the defendant was not bound to anticipate the action of the air currents, and, if the fire was so conveyed, this would constitute an intervening agency which would relieve from liability,—an instruction based on the testimony of two witnesses, who stated the wind aided in bringing down the fire, not in moving the oil over the surface before it occurred. No request was made of the court to so charge, and it seems to us the evidence did not warrant the statement made.

The court said: "If this oil was carried down stream by the wind, that is an intervening, independent agency. If.....the wind came and caused the fire to spread down, you must find a verdict for the defendant." This overlooked the fact that the presence of such a condition might have been, or the jury could say "should have been," observed, and that, in view of the atmospheric conditions, it might have been obvious that the fire would cause the injury which did result. "No doubt a hurricane or a gale may be such as to be plainly out of the usual course of nature, and therefore to be pronounced by the court as the intervention of a new cause..... But the ordinary danger of wind helping a fire to spread is one of the things to be naturally anticipated": *Haverly v. Railroad Co.*, 135 Pa. 50, 60; *P. R. R. Co. v. Hope*, 80 Pa. 373; 22 R. C. L. 162; 20 L. R. A. (N. S.) 92, n. Under the testimony presented, the appellant justly complains of the instructions given.

One other matter should be noted. The defendant offered evidence of the amount of insurance collected by reason of the fire. Though plaintiff objected, no exception was taken; complaint cannot therefore be now made of its admission. However, the court instructed the jury that in passing upon the damages claimed by plaintiff it should take into account the total insurance,—as indicating the value which the company placed upon its property. "Ordinarily the amount for which property is insured does not afford a test of value of sufficient probative effect to be admissible": 22 C. J. 180, 182. The present case does not furnish any facts which allow an exception to this rule: *Union Pac. R. R. Co. v. Lucas*, 136 Fed. 374; *Coleman v. Tepel*, 230 Fed. 63; *Holmes v. Rivers*, 145 Iowa 702, 124 N. W. 801. The submission of this evidence for the purpose of estimating the plaintiff's loss was erroneous.

Without further discussion, it follows from what has been said that a new trial must be had.

The judgment is therefore reversed and a *venire facias de novo* awarded.

Ferdisko v. Trimble & Sons Co. et al., Appellants.

Workmen's compensation—Widow—Remarriage of widow—Compensation to children.

1. Under the Workmen's Compensation Act of June 26, 1919, section 307, par. 4, P. L. 642, amending the Act of June 2, 1915, P. L. 736, where a widow remarries after having received compensation for a number of weeks, she is entitled to weekly compensation for one-third of the remaining 300 weeks, but not exceeding 100 weeks.

2. The children's compensation in such case, does not commence at the date of the widow's remarriage, but is postponed until after she has ceased to receive compensation.

Argued October 10, 1921. Appeal, No. 110, Oct. T., 1921, by defendants, from judgment of C. P. Allegheny Co., April T., 1921, No. 1556, affirming decision of Workmen's Compensation Board, in case of Annie Ferdisko v. W. F. Trimble & Sons Co., defendant, and Ætna Life Ins. Co. and Travelers Ins. Co., insurance carriers. Before MOSCHZISKER, C. J., FRAZER, WALLING, KEPHART, SADLER and SCHAFFER, JJ. Order modified.

Appeal from decision of Workmen's Compensation Board. Before STONE, J.

The opinion of the Supreme Court states the facts.

Decision affirmed. Defendants appealed.

Error assigned, inter alia, was above order, quoting it.

John M. Reed, with him *Frank P. Martin*, for appellants.—The proviso is repugnant to the enacting clause of the statute and confers no rights on the widow to compensation after remarriage: *Portuondo's Est.*, 191 Pa. 28; *Ihmsen v. Nav. Co.*, 32 Pa. 153.

Austin L. George, with him *William D. Grimes*, for appellee.—The proviso is not repugnant to the enacting

Arguments—Opinion of the Court. [272 Pa. clause of the statute: *Portuondo's Est.*, 191 Pa. 28; *Ihmsen v. Nav. Co.*, 32 Pa. 153; *Baldoff v. University*, 7 Dept. R. 66; *Fabian v. Coke Co.*, Id. 290; *Pobloski v. Coke Co.*, Id. 1000.

OPINION BY MR. JUSTICE SADLER, January 3, 1922:

John Ferdisko was killed while engaged in the regular course of business of the Trimble & Sons Company, leaving to survive him a widow and five minor children. In December of the same year, a claim petition was presented, the wife having in the meantime remarried. An award of compensation was made to begin as of June 28, 1920. To the widow was given 60 per cent of the wages, not exceeding twenty dollars, this being the rate fixed by the Act of 1915 (June 2, 1915, P. L. 736), as amended (Act June 26, 1919, section 307, par. 4, P. L. 642). The allowance was directed to be paid until November 25, 1920, the date of the remarriage. An additional award was made to her of 40 per cent for one-third of the remaining 300 weeks, under the proviso in paragraph 7 of section 307 of the Act of 1919, and of 60 per cent from the same date to the minor children, until the end of the 300-week period, the allowance being then reduced in accordance with the terms of this act, continuing, however, in each case until the age of sixteen was reached. An appeal was taken from this ruling of the board to the court of common pleas, which approved the finding. This decision we are asked to review.

The difficulty which has arisen is due to the amending Act of 1919. Under the terms of the earlier legislation the widow became entitled to compensation for three hundred weeks. This sum was for the support of herself and children, and not exclusively for her own benefit. If the award to her was commuted, the minor children were entitled to protection, for their interests were likewise affected. In *Lovasz v. Carnegie Steel Co.*, 266 Pa. 84, 86, we said: "While the compensation payable at stated intervals is given to the widow this does not

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vest in her the absolute right to squander the money and deprive the children of the support intended by the law, as the State, acting through one of its designated agencies, will, when called upon, see that the fund is properly applied. It is, therefore, an incorrect statement to say she can refuse to spend the money for care and maintenance of the children and leave them without such attention." If she remarried, the payment to her ceased at once, and was applied thereafter for the benefit of the minors alone, it being apparently assumed that the new relationship would interfere with the furnishing of proper support to the children.

This legislative policy was modified by the Act of 1919 (section 307, par. 7), which now directs: "Provided, however, that upon the remarriage of any widow, other than a nonresident alien widow, the employer shall pay to such widow the then value of the compensation payable to her, during one-third of the period during which compensation then remains payable but not exceeding one hundred weeks, calculated in accordance with the provisions of section 316 of this article."

The learned court below was of the opinion that this gave to the widow a commuted sum for her own use, and continued at the same time the full compensation for the children during the balance of the 300-week period, and thereafter at different rates until the age of sixteen was reached. To so hold would subject the employer to an additional financial burden, brought about through no fault of his own. The language of the amending act does not justify the inference that such was the purpose. Additional words would have to be added to reach that conclusion, and this will not be done unless necessary to carry out a plain legislative intent: *Catlin v. Pickett & Co.*, 262 Pa. 351.

Under the earlier law, the compensation ceased entirely upon remarriage. The result was to discourage the widow from such action, and encourage in place thereof the formation of illicit relationships, so that the

payments should not be lost. It was to remedy this situation that the new plan was devised. Instead of having all payments withdrawn from her, though presumably her minor children will still be in her care, a commuted sum was provided for assistance, it may be, in forming the new household. It is to be kept in mind that the original compensation was not for her sole benefit, but for the joint support of the family. She had but a fractional interest in the payments, though receiving them all. Originally, she lost even that portion when she remarried, but now is permitted to retain part for a limited period of time. The care of the children must continue as well, and the moneys paid must be used also for their maintenance. Paragraph seven, further amending the Act of 1915, permits the board to appoint a guardian when necessary to protect them, or to direct payments to the surviving parent, requiring a bond, with an accounting of receipts and disbursements, to insure proper application of the fund.

The doubt which has arisen in this case, as to the effect of the proviso, is largely caused by the language of the sentence following it, which reads: "If the compensation payable under this section to any person shall, for any cause, cease, compensation to the remaining persons entitled thereunder shall thereafter be the same as would have been payable to them had they been the only persons entitled to compensation at the time of the death of the deceased." The use of the word "thereafter" has been taken by the court below as conclusively indicating that the award to the minors shall begin as of the date of the remarriage, and the making of the commuted payment to the widow; but the section as a whole must be considered in searching for the legislative purpose. The clause in question is the same as that appearing in paragraph 9, section 307, of the Act of 1915. When there used it was appropriate, for all interest of the widow ceased with the remarriage, and the children acquired from that date the right to the entire award. Here, the

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situation differs, for the widow receives a sum for a further period, but for use of the entire family, as if she had not remarried. A contrary construction would lead to increased burdens upon the employer, which the act shows no purpose to assess.

It follows that the final order of the common pleas must be modified as to the amounts awarded; therefore, it is now decreed that Annie Ferdisko is to be paid compensation, at the rate of 60 per cent of \$20 per week, from June 28, 1920, to November 25, 1920, with interest; and a like sum for 92 19/21 weeks thereafter, for the support of herself and children, calculated in accordance with the provisions of section 316 of the Workmen's Compensation Act of 1915. From the expiration of this period, September 14, 1922, at the rate of 60 per cent of \$20, or \$12, to Mary, Catherine, John, Rosa and Anthony Ferdisko, to December 5, 1924, when Mary becomes sixteen years of age; then at the rate of \$10 to the other children, until March 27, 1926, the end of the 300-week period. From that date, compensation is awarded to Catherine, John, Rosa and Anthony, at the rate of 45 per cent of \$20, or \$9 per week, until May 28, 1927, when Catherine becomes sixteen; then to the remaining three at 35 per cent, or \$7 per week, until July 10, 1929, when John reaches the age of sixteen; then to Rosa and Anthony at 25 per cent of \$20 per week, or \$5, until December 11, 1931, when Rosa becomes sixteen, and from that date at the rate of 15 per cent, or \$3, to Anthony, until March 15, 1933, when he attains the age of sixteen.

Pobloskie v. Equitable Coke Co. et al., Appellants.

Argued October 10, 1921. Appeal, No. 111, Oct. T., 1921, by defendants, from judgment of C. P. Allegheny Co., April T., 1921, No. 705, affirming decision of Workmen's Compensation Board, in case of Mrs. John S. Pob-

130 POBLOSKIE v. EQUITABLE COKE CO., Appel.

Statement of Facts—Opinion of the Court. [272 Pa. loskie (formerly Mrs. Susanna Yoco) v. Equitable Coke Co., Defendant, and Ætna Life Insurance Co., insurance carrier. Before MOSCHZISKER, C. J., FRAZER, WALLING, KEPHART, SADLER and SCHAFFER, JJ. Order modified.

Appeal from decision of Workmen's Compensation Board: 7 Dept. R. 1000. Before STONE, J.

Decision affirmed. Defendants appealed.

John M. Reed, for appellants.

No printed brief for appellee.

OPINION BY MR. JUSTICE SADLER, January 3, 1922:

This appeal raises the same question as *Ferdisko v. Trimble & Sons Company*, this day decided. As in that proceeding, the decree of the court of common pleas must be modified, and therefore, it is now decreed that Mrs. John S. Pobloskie, formerly Mrs. Yoco, widow of decedent, shall be awarded compensation, as provided by the Workmen's Compensation Act of 1915, and its amendment, of 60 per cent of \$20 per week, from March 14, 1920, to August 25, 1920, the date of her remarriage, and a sum equal to 60 per cent of \$20 or \$12 per week for 92 4/21 weeks, to be commuted as provided by section 316 of the Workmen's Compensation Act; and from the expiration of that period, to wit, May 26, 1922, there shall be paid to the Union Trust Company, guardian of Joseph, Stephen, Andrew and John Yoco, 50 per cent of \$20, or \$10 per week, for a period of 184 8/21 weeks; then to the Union Trust Company, guardian of Joseph, Stephen, Andrew and John, 45 per cent or \$9 per week, until April 27, 1930, when Joseph arrives at the age of sixteen; then to the guardian of Stephen, Andrew and John, at the rate of 35 per cent, or \$7 per week, until October 31, 1931, when Stephen arrives at the age of

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sixteen; then to the guardian of Andrew and John, at the rate of 25 per cent, or \$5 per week, until October 20, 1933, on which date Andrew becomes sixteen; then to the guardian of John, 15 per cent, or \$3 per week, until January 20, 1936, on which date the minor will have arrived at the age of sixteen years.

Gloekler v. Painter, Appellant.

Contract—Exchange of automobiles—Breach of contract.

1. The measure of damages for breach of a contract to pay a fixed sum in a particular commodity or specific articles of property, is the sum stated, and the value of the commodity at the time of the breach is not material.

2. Where a person agrees to purchase from a dealer an automobile, to be delivered at a specific time, paying part of the price by delivering a used car at an agreed valuation, and the balance in cash on delivery of the new car, which could not be obtained, the measure of damages is the sum at which the used car was valued, and not its value at the time of the breach.

3. The loss sustained by the seller's breach, under ordinary circumstances, is determined by the difference between the market price and the contract price at the time of delivery; but where the article cannot be obtained, the measure is the actual loss which the vendee can show he has sustained.

Argued October 11, 1921. Appeal, No. 68, Oct. T., 1921, by defendant, from judgment of C. P. Allegheny Co., Jan. T., 1920, No. 1742, on verdict for plaintiff, in case of J. Edward Gloekler v. Edward S. Painter, trading as Painter Motor Car Co. Before MOSCHZISKE, C. J., FRAZER, WALLING, KEPHART, SADLER and SCHAFER, JJ. Affirmed.

Assumpsit for breach of contract. Before REID, J.

The opinion of the Supreme Court states the facts.

Verdict—Opinion of the Court. [272 Pa.

Verdict and judgment for plaintiff for \$1,616.59. Defendant appealed.

Errors assigned, inter alia, were (1-3) rulings recited in the opinion of the Supreme Court, quoting record.

J. Merrill Wright, of Wright, Chalfant & McCandless, for appellant.—When the breach occurs, the party to whom performance is due must elect whether he will rescind or demand a continued performance, and the failure of the adverse party to perform does not of itself rescind the contract: *Smethurst v. Woolston*, 5 W. & S. 106; *Seanor & Bierer v. McLaughlin*, 165 Pa. 150; *Meacham v. Gardner*, 27 Pa. Superior Ct. 296; *Seward v. Mfg. Co.*, 266 Pa. 457.

William D. Grimes, for appellee.—When the article cannot be obtained in the market measure of damage is the actual loss which vendee sustains: *McHose v. Fulmer*, 73 Pa. 365; *Kinports v. Breon*, 193 Pa. 309; *Billmeyer v. Wagner*, 91 Pa. 92; *Bradley v. McHale*, 19 Pa. Superior Ct. 300; *Culin v. Glass Works*, 108 Pa. 220; *Rotograph Co. v. Cressman*, 41 Pa. Superior Ct. 14.

OPINION BY MR. JUSTICE SADLER, January 3, 1922:

The plaintiff, Gloekler, agreed to purchase from the defendant, an automobile of special design for \$3,285. He sold his used car to the latter for \$1,600, admittedly a fair and reasonable price, for which sum credit was to be given. Pursuant to this understanding, the defendant took possession of the old motor, made certain changes, and used it in his business for several months, with resulting deterioration, as found by the jury. The new machine was not furnished within the time fixed by the parties, though delivery was frequently requested. In order that a car could be obtained for present service, the buyer agreed to waive certain provisions of the contract, and accept a stock model. Again delay occurred,

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which led to a demand for compliance by a certain date, in default of which plaintiff signified his intention to cancel the order and insist upon the cash value of the motor he had transferred. This offer was not accepted in terms, but Gloekler was notified of defendant's willingness to terminate the contract, and that the car purchased from him would be returned. An effort to redeliver to plaintiff's garage was made, but he refused to receive it.

An action was brought to recover for the loss sustained by reason of the default of vendor, and damages were asked on several grounds. At the trial, all claims were abandoned except for the fixed value of the car taken over by the defendant. The trial was based on the assumption that the contract had been disaffirmed, wherein the case is to be distinguished from *Smethurst v. Woolston*, 5 W. & S. 106, relied on by appellant; and the theory upon which the case was heard in the court below is controlling on appeal. The jury, under proper instructions, found that the title to vendee's car had passed to the vendor, who had the possession and use of it, and returned a verdict for plaintiff for \$1,600 and interest, less the amount of an admitted counterclaim.

Appellant now suggests certain errors. One is based upon the failure of Gloekler to show that, when he sold his second-hand car, there was a compliance with the requirements of the Act of June 30, 1919, P. L. 702, regulating such transactions; but this complaint was not pressed on argument. Again, it is urged there was a mutual rescission, which relieved of further liability upon the return of plaintiff's car. But the acceptance of the cancellation of the original order was not unqualified; a new condition was substituted for the one made in the offer, viz: that permission be given to send back the used motor, whereas demand had been made for its value in cash.

The only question requiring discussion is raised in the third assignment of error: What is the true measure of damages when the vendee has paid part of the purchase price agreed upon, or has transferred property to the vendor on account thereof, when the latter fails to comply with the contract he had made? The amount of recovery is limited by the loss directly or naturally resulting, in the ordinary course of events, from the seller's breach. In the absence of special circumstances, this is determined by the difference between the market and contract price at the time fixed for delivery, if there is an available market. (Sales Act May 19, 1915, P. L. 543, section 67.) Where, however, the article in question cannot be so obtained,—here, neither the manufacturer nor his agent could supply,—the measure is the actual loss which the vendee can show he has sustained: *McHose v. Fulmer*, 73 Pa. 365; *Kinports v. Breon*, 193 Pa. 309; *Seward v. Pa. Salt Mfg. Co.*, 266 Pa. 457; *Vilsack v. Wilson*, 269 Pa. 77.

In the present case, the second-hand automobile was purchased by appellant for \$1,600, and he took possession of and used it for a considerable time; in effect, there was a payment of this sum on account of the new car contracted for. If a vendor has sold goods and made delivery, it is clear that the measure of damages for non-payment would be the stipulated price: *Ballentine v. Robinson*, 46 Pa. 177, 179. With like reason, the vendee who performs or tenders performance of his obligation under a contract, when the vendor is unable to carry out his part of the agreement, may rescind and recover any portion of the purchase money he may have paid: *Rugg v. Midland Realty Co.*, 261 Pa. 453; *Terry v. Wenderoth*, 147 Pa. 519; 24 R. C. L. 65. Here, cash was not turned over, but an automobile at an agreed price, and the same rule should control. "The measure of damages for breach of a contract to pay a fixed sum in a particular commodity or specific articles of property is the sum stated, and the value of the commodity at the

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time of the breach is not material": 17 C. J. 865. The defendant was to pay for the old car by the delivery of one that was new, in which event he was to receive an additional amount in money. He has failed to comply with his agreement; as a result, he must pay the stipulated value of that which he received and converted to his own use: Cf. Goodwin v. Heckler, 252 Pa. 332.

It follows from what has been said that the assignments of error should be, and they are, overruled.

The judgment is affirmed.

Reel's Estate. Foreman's Appeal.

Wills—Decedents' estates—Deficiency of personal assets—Real estate—Conversion—Payment of insurance—Creditors—Failure to establish lien—Conversion—Necessity.

1. Where there is a failure of personal assets with which to pay the debts of a decedent, creditors who have failed to establish a lien on the real estate cannot participate in the distribution of the proceeds of a sale thereof, in the absence of conversion by the will, although their claims have been approved at the audit of the executor's account.

2. Where a testatrix by her will gave no positive direction to sell real estate, but leaves personal assets insufficient to pay debts and legacies, and directs that her real estate shall be held for memorial purposes, there is no conversion of the real estate by necessity.

3. The necessity must have been contemplated by testatrix, in order that the scheme of the will could be carried out, and not be merely a necessity as a matter of fact arising out of the actual circumstances of the estate after death.

Argued October 11, 1921. Appeal, No. 73, Oct. T., 1921, by Henry A. Foreman, a creditor, from decree of O. C. Allegheny Co., Sept. T., 1920, No. 741, dismissing exceptions to adjudication, in estate of Almatia L. Reel, deceased. Before MOSCHZISKE, C. J., FRAZER, WALLING, KEPHART, SADLER and SCHAFFER, JJ. Affirmed.

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Exceptions to adjudication. Before MILLER, P. J.

The clause of the will of Almatia L. Reel which is the subject of consideration is as follows: "All the rest and residue of my estate, including my dwelling-house known as Reel Hall, and all furniture and fixtures therein contained, I give, devise and bequeath unto The Grand Lodge of Pennsylvania of Free and Accepted Ancient York Masons as a memorial to my deceased parents and to my deceased brother, Casper Reel, Jr., a former member of said Masonic Order, to be known as 'Reel Hall' and to be used for such charitable, educational or Masonic purposes as may be deemed best from time to time by said Grand Lodge. It is my desire that the dwelling house known as 'Reel Hall,' shall be preserved by said trust as long as possible, and that thereafter another building to be known as 'Reel Hall' shall be erected at or near its present site."

Other facts appear by the opinion of the Supreme Court.

Exceptions dismissed. Henry A. Foreman, a creditor, appealed.

Error assigned, among others, was decree, quoting it.

A. D. Wilkin, for appellant.—The will worked a conversion: *Hunt's App.*, 105 Pa. 128; *Cooper's Est.*, 206 Pa. 628; *Keim's Est.*, 201 Pa. 609; *Jones v. Caldwell*, 97 Pa. 42; *Vanuxem's Est.*, 212 Pa. 315; *Severns's Est.*, 211 Pa. 65.

George H. Quail, for appellees.—There was no conversion: *Oliver's Est.*, 199 Pa. 509; *Yerkes v. Yerkes*, 200 Pa. 419; *Sauerbier's Est.*, 202 Pa. 187; *Raleigh's Est.*, 206 Pa. 451; *Henszey's Est.*, 220 Pa. 212; *Chamberlain's Est.*, 257 Pa. 113; *Luffberry's App.*, 125 Pa. 515.

OPINION BY MR. JUSTICE SADLER, January 3, 1922:

Almatia L. Reel died possessed of a small amount of personalty and encumbered real estate. By her will she

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bequeathed large sums, in proportion to the size of her estate, to various legatees, and gave the rest and residue, including her dwelling house, known as Reel Hall, to the Grand Lodge of Masons as a memorial. She directed that this building be preserved as long as possible, and thereafter a new structure be erected near the same site to bear the same distinctive name. No power of sale was given to the executors named. The personal estate was less than one thousand dollars, and creditors had valid claims of many times this amount. Specific legacies more than equaled the entire value of the realty and personalty, and these constituted charges upon the land: Reel's Est., 266 Pa. 221.

The appellant had a claim, the justice of which does not seem to be disputed. It was presented at the audit of the first account of the executors, and allowed by the orphans' court. No steps were taken, however, at any time to secure and maintain a lien on the decedent's real estate, it being apparently assumed that the will worked a conversion, and that the proceeds of the sale of the testatrix's land would be considered personalty. Subsequently, the property was disposed of, and the sum received was brought before the court for distribution. Clearly, the debt is not payable therefrom unless there was a conversion, as first indicated by the auditing judge. Though the orphans' court had authority to adjudicate what sums were due by the decedent, and to order the land sold for the payment of debts, yet an award by it will not obviate the necessity of complying with the conditions fixed by statute, if the creditor is to share in the proceeds of the realty. Reference need be made only to the recent discussion of this proposition in *Kirk v. Van Horn*, 265 Pa. 549, 555.

The right of the appellant must rest therefore on the determination of the character of the fund for distribution. Upon reconsideration, the orphans' court found that no conversion was worked, and that the proceeds of the sale were in effect realty, with the result that cred-

itors, who had failed to comply with the statutory requirements by securing a lien within the time prescribed, were barred from participation. This conclusion is amply sustained by the authorities.

As was said in *Hunt's and Lehman's Appeals*, 105 Pa. 128, 141, and has been repeated frequently, there must be either, "1st, a positive direction to sell; or, 2d, an absolute necessity to sell in order to execute the will; or, 3d, such a blending of real and personal estate by the testator in his will as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath the said fund as money."

In the present case, there is no positive direction to sell, nor is there even a power of sale for the payment of debts, which, in itself, would be insufficient to work a conversion: *Davidson v. Bright*, 267 Pa. 580. We find no discretion lodged in any one to dispose of the realty: even this would not be enough: *Chamberlain's Est.*, 257 Pa. 113. The only theory on which the change into personalty could be sustained would rest on an absolute necessity to sell for the purpose of paying debts and legacies. It is argued that, in view of the small amount of personalty, the testatrix must have been conscious of the fact that the sale of her lands would be required; from this, an intention that this be done is inferred. "The question of conversion is to be determined from the will itself, and is not affected by the accidental fact that the personal estate may prove insufficient for the payment of the legacies": *Chamberlain's Est.*, *supra*. The necessity must have been contemplated in order that the scheme of the will could be carried out, and not be merely a necessity as a matter of fact arising out of the actual circumstances of the estate after death.

An examination of the will before us does not justify the conclusion that the testatrix had in mind the disposal of her realty. On the contrary, it was her purpose that it be conserved for memorial purposes. She may have believed that the residuary legatee would pay the

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legacies, and establish the home as desired by her. Clearly, she was not blending her estate with the purpose of bequeathing the whole fund as money, for it was her desire to have Reel Hall maintained.

This case is not ruled by Vanuxem's App., 212 Pa. 315; Severns's Est., 211 Pa. 65, or Keim's Est., 201 Pa. 609, cited by appellant, where directions to sell appear, and such action became necessary for the purpose of distribution; but by the principles enunciated in Chamberlain's Est., supra, and Davidson v. Bright, supra. No conversion was worked, and the fund in hand was properly distributed to those creditors who had secured a lien upon the land, and the legatees whose claims were a charge thereon.

The assignments of error are overruled, and the decree of the orphans' court is affirmed at the cost of the appellant.

Reel's Estate. Reel's Appeal.

Decedents' estates—Claims paid by executor—Preservation of estate—Fund raised by sale of real estate—Rents—Unsecured creditors—Act of June 7, 1917, P. L. 447.

1. Where executors have paid taxes, interest on mortgage, and a judgment, in order to preserve the estate, they are entitled to be reimbursed out of the proceeds of real estate, sold more than a year after testator's death, in the absence of sufficient personal assets, although they have taken no steps to establish a lien on the real estate.

2. Rents collected by the executors under authority of the Act of June 7, 1917, section 14, P. L. 447, are assets for the payment of unsecured creditors having no lien on the real estate.

Argued October 11, 1921. Appeals, Nos. 73-6, Oct. T., 1921, by Casper Reel, John D. Quail and George H. Quail, legatees, from decree of O. C. Allegheny Co., Sept. T., 1920, No. 741, dismissing exceptions to adjudication, in estate of Almatia L. Reel, deceased. Before

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MOSCHZISKER, C. J., FRAZER, WALLING, KEPHART, SADLER and SCHAFFER, JJ. Decree modified.

Exceptions to adjudication. Before MILLER, P. J.

The opinion of the Supreme Court states the facts.

Exceptions dismissed. Casper Reel, John D. Quail and George H. Quail, legatees, appealed.

Error assigned, inter alia, was decree, quoting it.

George H. Quail, for appellants.—A proceeding in the orphans' court is not, nor is a presentation of a claim before an auditor, sufficient to continue the lien of the debts of decedent, and the same will apply to expenses of administration: *Bartley's Est.*, 20 Pa. C. C. R. 451; *Bindley's App.*, 69 Pa. 295; *Kirk v. Van Horn*, 265 Pa. 549; *Loomis's App.*, 29 Pa. 237; *Demmy's App.*, 43 Pa. 155; *Hunt's App.*, 14 W. N. C. 377; *Aurand's Est.*, 40 Pa. C. C. R. 343.

Statutes limiting the time within which suits must be brought in order to continue the lien of debts are statutes of limitation and repose and protect not only bona fide purchasers but widows, heirs, and devisees and those claiming under them: *Kerper v. Hoch*, 1 Watts 9; *Kirk v. Van Horn*, 265 Pa. 549; *Ferguson v. Yard*, 164 Pa. 586; *Clauser's Est.*, 1 W. & S. 208; *International Harvester Co. v. Twp.*, 43 Pa. Superior Ct. 410; *Merkel's Est.*, 154 Pa. 285.

E. C. Chalfant, of *Wright, Chalfant & McCandless*, for appellee.—That the Commonwealth Trust Company, in advancing this money, was not a mere volunteer, there can be no question: *Mustin's Est.*, 188 Pa. 544; *Donnelly's Est.*, 246 Pa. 308.

That an executor may be reimbursed for money advanced for payment of a mortgage is also well settled: *Bentley's Est.*, 196 Pa. 497.

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OPINION BY MR. JUSTICE SADLER, January 3, 1922:

These appeals are from the adjudication of the orphans' court in Reel's Estate, one phase of which has already been discussed in an opinion this day filed in Foreman's Appeal. A repetition of essential facts appearing therein is unnecessary here.

The Commonwealth Trust Company, one of the executors of Almatia L. Reel, made certain advances for the preservation of the estate, during the course of its settlement, and paid certain other claims, which can be considered as ordinary indebtedness. No attempt was made, as was true also in Foreman's Appeal, to secure a lien upon the real estate, the proceeds of which are now before the court for distribution. The auditing judge approved the claims as presented at the hearing of the first account. Subsequently, it came to the conclusion that no conversion had been worked, and that the fund before it was to be treated as realty. It therefore refused allowance to those creditors who had failed to charge the land by appropriate proceedings. In the case of the present appellee, however, a different conclusion was reached, and an award to the claimant was made. To test the correctness of this finding, the present appeals were taken by three of the legatees.

In passing upon this demand of the executor, it must be kept in mind that such a fiduciary stands ordinarily in no better position than the unsecured creditor, when he advances his money to pay debts of the estate; having done so, he must, to charge the land, comply with the statutory requirements in order to secure a lien: *Merkel's Est.*, 154 Pa. 285. If, however, the payment is made for the preservation of the estate, and is one which could have been directed by the court by precedent decree, the disbursement may be ratified and a refunding be ordered: *Mustin's Est.*, 188 Pa. 544; *Bentley's Est.*, 196 Pa. 497.

The learned court below allowed the full amount of the sum demanded, and as to a portion thereof we think it was clearly right in so doing, under the rule laid down

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in Donnelly's Est., 246 Pa. 308, and other cases. An outlay was made for taxes, for interest upon a mortgage, and to satisfy a judgment which was a lien. These advances were required to save the estate from loss and were made in entire good faith. The balance of the bill, amounting to \$481.37, stands on a different footing. It is composed largely of an open account of the trust company against the decedent for services rendered as attorney in fact, while she was living. Certain other small payments made up the difference. It cannot be said that the liquidation of these ordinary debts was required for the preservation of the estate. As to this part, the executor was a mere volunteer, and, not having secured a lien against the realty, it cannot now claim to share in the proceeds of the sale. It must look, with the other claimants, to the personal fund, if any, to a proportion of which it would be entitled.

In determining the amount of the assets for distribution, in which unsecured creditors may share, there is to be included the various items of rent received. Under the provisions of section 14 of the Fiduciaries Act (June 7, 1917, P. L. 447), the executors, on petition, were authorized to collect the rentals from the real estate: Reel's Est., 263 Pa. 248. Having received them, the sums paid in are, by the express wording of the above section, to be accounted for as a portion of the personal estate, and they become part of the fund for the payment of debts. Such rents as were here thus collected, are to be included in the balance to which the creditors generally may look, though the right to share in the proceeds of the realty is lost by failure to comply with the statute.

The decree of the court below is accordingly modified, and distribution is directed to be made in accordance with the views herein expressed; the costs to be paid by the estate.

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Syllabus.

Lilley's Estate.

Wills—Perpetuity—Illegal devise—Intention—Trusts and trustees.

1. A perpetuity is any limitation or condition which may take away or suspend the absolute power of alienation for a period beyond life or lives in being and twenty-one years thereafter. If there is any possibility that a violation of this rule may happen, the devise is void.

2. The rule is to be applied after testator's intentions are discovered; its object is to defeat a manifest intention which is contrary to a well recognized policy of the law.

3. The rule has to do with future estates, which, by possibility, may not become vested within the time prescribed by law; it applies only to future estates which are contingent, and has no application to vested estates.

4. If an absolute term of years is specified by the testator, and no anterior term for a life in being is referred to, such absolute term cannot be longer than twenty-one years from testator's death. The rule applies to both equitable and legal estates.

5. Where a testator creates an active trust in two nephews, named as executors, and their successors, to collect, invest, accumulate, conserve and divide the property at the end of ninety-nine years, and provides that no portion of the estate, either principal or income, shall be parted with during that period, and that final distribution shall be made to the heirs of the two nephews living at that time, the gift is contingent, as there can be no vesting until the identity of the persons to take is determined, and the devise violates the rule against perpetuities.

6. The prior estate held by the executors falls with the gift, and a resulting trust arises in the heirs at law and next of kin of the testator.

7. Where the provisions creating the particular estate in trust are inseparable and dependent parts of the testator's main scheme to tie up his residuary estate in the ultimate gift, and thereby prevent the vesting until a date too remote under the rule, such provisions, including all the agencies or means designed to accomplish the desired and forbidden end, are void.

Wills—Perpetuities—Illegal devise—Trusts and trustees—Mining coal—Royalty agreement—Inseparable illegal purpose—Option—Time for acceptance necessary.

8. Where a testator owning a controlling interest in the shares of a coal company and an absolute estate in a large acreage of coal, gives such estate to trustees, with active duties, to hold for ninety-nine years, and the terms of the will show an obvious purpose to violate the rule against perpetuities, a direction in the will that the "coal may be opened up and worked on a royalty to suit the company" is null and void.

9. As such provision was the chief instrument to accomplish the illegal purpose of the will and was inseparably connected with such purpose, it fails with the illegal trust created by the will.

10. Even if it should be considered as separable from the will, and for the benefit of the corporation, it fails, because (1) it is not a devise upon a condition subsequent; (2) it is not a gift; (3) it could not become effective until the trustees entered into a contract with the company, and they had no power to do so; and (4) it was not an option, as no time for acceptance was stated.

Argued October 3, 1921. Appeals, Nos. 98 and 100, Oct. T., 1921, by Thomas Elliott and Jacob Elliott, Executors, and Lilley Coal & Coke Co., Intervener, from decree of O. C. Washington Co., May T., 1920, No. 50, refusing executors' petition to execute an agreement, in estate of Thomas E. Lilley, deceased. Before MOSCHIZSKER, C. J., FRAZER, WALLING, SIMPSON, KEPHART, SADLER and SCHAFFER, JJ. Affirmed.

Petition of executors to execute a royalty agreement. Before HUGHES, P. J.

The opinion of the Supreme Court states the facts.

Petition dismissed. Thomas Elliott and Jacob Elliott, executors, and Lilley Coal & Coke Co., intervener, appealed.

Error assigned, inter alia, was decree, quoting it.

M. W. Acheson, Jr., with him Acheson & Crumrine, Sterrett & Acheson, Cottom & Cottom and Wiley, Mariner & Wiley, for appellants.—The benefaction in favor

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of the Lilley Coal & Coke Company in item 10 of the will is not associated with the decedent's residuary dispositions: *Whitman's Est.*, 248 Pa. 285.

Item 10 itself does not violate the rule against perpetuities: *Newell's App.*, 24 Pa. 197; *Singerly's Est.*, 14 Phila. 313.

Richard G. Miller, with him *J. Olan Yarnall*, *R. H. Meloy*, *McIlvaine*, *William & McCreight*, *J. C. Davies*, *Francis A. Dunn* and *John H. Donnan*, for appellees.—Item 10 is part of the general scheme and dominant purpose of the will, and is inseparable therefrom.

If item 10 were separable from the will as a whole, it would be nothing more than the grant of an option to Lilley Coal and Coke Company, or a discretionary power in the executors, and would in itself violate the rule against perpetuities: *Ludwick's Est.*, 269 Pa. 365.

OPINION BY MR. JUSTICE KEPHART, January 3, 1922:

This is an appeal from a decree of the court below refusing to grant authority to the executors of Thomas E. Lilley to join in and execute a proposed royalty agreement; while the decree of the court below denied the prayers of the petition, its effect was vastly more comprehensive, for, to deny the requests, the validity of the will must be attacked. The executors, and others interested, have taken this appeal. The proceedings are complicated, and it is necessary to briefly recite those upon which the decision must rest.

Thomas E. Lilley, aged seventy years, by occupation a farmer, resided in Washington County, Pa. He died January 5, 1920, unmarried, and his surviving relatives were his sister, Jane Elliott, with her two children, Thomas and Jacob Elliott, and two children of a deceased brother, Charles and Walter Lilley. Deceased was worth, approximately, \$2,000,000. His holdings consisted of personal property valued for taxation in round numbers at \$1,700,000, and real estate at \$725,000.

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He was one of the promoters of the Lilley Coal & Coke Company, which was prosperous and in excellent financial condition. He owned 1,620 of its 2,000 shares, and, in 1912, transferred to it by lease four hundred acres of coal at a royalty of twenty cents a ton, with a minimum of \$40,000 a year, and, in 1918, one hundred and seventy-five acres at a royalty of thirty cents a ton. When he died, the company had five hundred and twelve acres of coal unmined.

In his real estate, enumerated in the appraisement, was a block of Pittsburgh coal, approximately 1,750 acres, in West Bethlehem and Amwell Townships, of the value of \$625,000; this piece of land is the subject of the present proceeding.

An examination of the will of Thomas Lilley shows that he evidently wrote it; in places it is inartistically phrased, particularly the part controlling the question now before us. By it his sister's children, Thomas and Jacob Elliott, are given the proceeds of his farms, \$2,000 a year to burn lime, and a like sum to keep them in repair. Jacob must live on the farm, at a yearly salary of \$1,500; if he does not, everything "willed to him is to be void and of no effect, and in that event Thomas Elliott is to live on the farm." And, if Thomas refused to do so, everything willed to him was to be void, and Etta Lilley was to have "everything, to hold the same in trust for ninety-nine years." Thomas was to be president of the Lilley Coal Company and to receive two hundred shares of its stock; fifty shares are given to persons named; \$10,000 to Etta Lilley, and \$5,000 to Charles Ullery. Taxes are to be paid out of the estate. These various gifts or directions constitute all the deductions to be made from this large estate.

The stock in the Lilley Coal & Coke Company is to be held in the estate, and, item 10, "the mines are to be run the same as they are at my death, and all other coal that I own or have an interest in, except the hill vein that is for the farm, can be opened up any place that suits the

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company, and worked on a royalty to suit the company." All accumulations of the estate are to be invested in government bonds or coal lands.

Thomas and Jacob Elliott were appointed executors, with power to select a successor. All the property, including income from royalties, invested as directed, is to be held for ninety-nine years; "at the end of ninety-nine years [the] estate is to be divided between the heirs of Thomas Elliott and Jacob Elliott, provided that each complies with the terms and provisions of the will. If they do not comply with the provisions of this will, then and in that case, at the end of ninety-nine years, the estate is to be divided between the heirs of Thomas Elliott."

The Lilley Coal & Coke Company, by formal action, accepted the rights and benefits bequeathed and devised to it under item 10 of the will ("company" therein mentioned referring, by agreement, to that concern), delivering a copy of its acceptance to the executors and offering to enter into a royalty agreement. Subsequently they executed and delivered to the executors an agreement for the "other coal," or what is known as the Ross Block; by it a royalty of twenty cents a ton was to be paid, with a minimum of \$50,000 a year. It is admitted this price is adequate and fair.

The executors, Thomas and Jacob Elliott, under section 28, clause C of the Fiduciaries Act, petitioned the court for authority to join in this agreement. Charles and Walter Lilley, nephews of the deceased, filed an answer denying the company had any interest or right in the coal land of Thomas Lilley, deceased, and that item 10, under which it claimed such interest or right, was void, as offending the rule against perpetuities; and that, Thomas E. Lilley having died intestate as to his residuary estate, it passed to the surviving sister and respondents, as next of kin and heirs at law.

The Lilley Coal & Coke Company appeared by petition, asserting its right under item 10, and was permit-

ted to be heard as a party. The Union Coal & Coke Company, having purchased the interests of the sister and the two nephews, intervened as a party to the proceedings. The Lilley Company maintained that item 10 was a devise of the Ross Coal, even if the ultimate gift of residuary estate was void as against perpetuities; that the devise of this block of coal was independent of and separable from the void or illegal provisions and limitations. The executors take the same position. The court below having determined the matter adversely to the original petitioners, the company and the executors each take an appeal from the decree.

Is testator's ultimate gift of his residuary estate to the heirs of Thomas and Jacob invalid and void because it violates the rule against perpetuities? If it does, are the interests or privileges contained in item 10 inseparable parts of the general scheme of testator to accomplish such unlawful result, so that, if the gift falls, all parts fall with it? Does item 10 violate the rule against perpetuities, considering its provisions separately from and unrelated to the general scheme of the will, so as to make an invalid gift?

A perpetuity is any limitation or condition which may take away or suspend the absolute power of alienation for a period beyond life or lives in being and twenty-one years thereafter. If there is a possibility that a violation of this rule may happen, the devise is void. It is void if persons, to take, may possibly not be ascertained before, or the contingency may happen after the expiration of life or lives in being at the creation of the interest and for twenty-one years and possibly nine months thereafter, or the expiration of twenty-one years after the creation of the interest (see Foulke on Perpetuities, page 185 et seq., and exception as to charities: Act of May 9, 1889, P. L. 173).

The rule is to be applied after testator's intentions are discovered; its object is to defeat a manifest inten-

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tion which is contrary to a well recognized policy of the law.

The court below found, "The will evidences a fixed desire and dominant purpose on the part of the testator, to tie up and hold together his residuary estate in his name and grasp for a period of ninety-nine years following his death; before the expiration of which period, no portion of his estate is to vest in any person." We all concur in this finding. The title to the property was to remain all the time in his name and control. The motive advanced in such cases is a selfish one,—a reluctance to give up property, even at death, and vanity, that a name might be perpetuated. Indeed, the contrary of this finding is not seriously contended.

There is no express residuary clause in the will, and what is left, after the few comparatively small deductions before referred to are allowed, will pass as undisposed of estate. The nephews mentioned were a secondary consideration to the estate that was to be accumulated. During the ninety-nine years no one gets a dollar of this vast income or property, except the small bequests mentioned. His estate and its accumulations consist of farms, coal lands, royalties from coal lands and shares of stock in coal companies, and he directs that these shares shall be held in his estate until distribution. He orders, or attempts to order, his coal lands to be disposed of by sale, and all accumulations of surplus therefrom, or from royalty, sales or otherwise, shall be invested and reinvested in government bonds or coal lands. The insignificant bequests only emphasize the prevailing thought in testator's mind, and, while he does not carefully instruct his executors as to their duties in the protection of this property (nor does he raise a specific trust for that purpose in others), his purpose, shown by a careful reading of the will, was to fix on the executors a trust responsibility,—not only through the manner and purpose of succession, but through specific directions as to future investments and

the upkeep of his property, the collection of royalties, dividends, interest on government bonds and other re-investments. It was intended that the trust (applicable in a certain instance to Etta) should apply to Thomas and Jacob. This is a fair deduction from the will; an active trust is created in the executors and their successors for ninety-nine years, to collect, invest, accumulate, conserve and divide the property at the end of ninety-nine years. The duties imposed on the executors named in the will are beyond those of ordinary administration, and they officiate, if at all, as trustees under the will; the legal title of the residuary estate became vested in the executors, and will pass on to their successors until final distribution. Every provision, aside from the minor bequests mentioned, contemplates accumulation of capital and income in the residuary estate through the agency of this active trust (see *Henderson's Est.*, 258 Pa. 510, 514; *Perry on Trusts*, 6th ed., section 312), to be distributed at the end of ninety-nine years to the heirs, that is, the surviving relatives, whether lineal or collateral, of his nephews, who, as their heirs at law or next of kin, would be entitled to receive such nephews' estate.

The rule against perpetuities has to do with future estates which, by possibility, may not become vested within the time prescribed by law; it applies only to future estates which are contingent, and has no application to vested estates: *Phila. v. Girard's Heirs*, 45 Pa. 11, 27; *Lawrence's Est.*, 136 Pa. 354, 367; *Johnston's Est.*, 185 Pa. 179, 185; *Gerber's Est.*, 196 Pa. 366, 379; *Barton v. Thaw*, 246 Pa. 348, 352; *Edward's Est.*, 255 Pa. 358, 365. In the Lilley will the postponement is for the benefit of those entitled to take on distribution; it is not postponed to accommodate the estate or let in other interests; there are no intervening estates. The gift, as implied from the direction to divide, is thereby postponed; the vesting of ownership is put off, not merely the possession or enjoyment of it: *Moore v. Smith*, 9 Watts 403,

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407; Kountz's Est., 213 Pa. 390, 395; Rosengarten v. Ashton, 228 Pa. 389, 394; Battenfeld v. Kline, 228 Pa. 91, 94; Rau's Est., 254 Pa. 464, 470; Evans's Est., 264 Pa. 357, 360; Hildebrant's Est. 268 Pa. 132, 135; Marshall's Est., 262 Pa. 145, 147; Groninger's Est., 268 Pa. 184, 190. Moreover, testator intends that only the heirs of Thomas and Jacob living at the expiration of ninety-nine years shall share. They take directly from the testator. The two nephews named have no vested interest in the residuary estate; only such heirs who may be living shall participate. It follows there can be, presently, no persons answering the description of the persons who can participate. Their taking is made contingent on surviving and being in existence at the termination of ninety-nine years.

The court below concluded that the ultimate gift was contingent, and in this conclusion we agree.

We stated that the rule against perpetuities affected dispositions taking effect beyond life or lives in being and twenty-one years. The testator does not adopt the plan of life in being, but uses a term of years. Under such circumstances, "if an absolute term is taken and no anterior term for a life in being is referred to, such absolute term cannot be longer than twenty-one years": Johnston's Est., 185 Pa. 179, 184; Perry on Trusts, 6th ed., section 380; Foulke, section 340; Barton v. Thaw, 246 Pa. 348, 355. There is nothing in the will that can be taken as measuring life or lives in being; the gift must be considered from the period of twenty-one years, if at all, and the interest against which the rule is directed must vest within the time prescribed by the rule,—here twenty-one years from testator's death. If the contingency noted may happen beyond that period, the whole interest limited is void: Coggins's App., 124 Pa. 10, 29; Gerber's Est., 196 Pa. 366, 380; Leisenring's Est., 237 Pa. 60, 67; Barton v. Thaw, 246 Pa. 348, 354; Penrose's Est., 257 Pa. 231, 233. As noted, it is not whether the contingency might actually happen, but it

is the possibility of its happening beyond the period that destroys the interest limited thereon; this is true with respect to the person who is to take, and the period of vesting takes effect from the date of the testator's death (Foulke, section 342; 21 R. C. L. 294; Lawrence's Est., 136 Pa. 354, 364; Bender v. Bender, 225 Pa. 434. 439, 440; Barton v. Thaw, 246 Pa. 348, 352); the same rules apply equally to equitable as well as to legal estates: 21 R. C. L. 305. No person is mentioned in connection with the ultimate gift, except the heirs of Thomas and Jacob, and they cannot exist until the death of these nephews, which may be beyond twenty-one years.

Applying, then, the rule, there is a clear violation in the gift, as the parties who are to receive it are unknown and cannot be known until the expiration of the time named, or until the death of the persons named. There can be no vesting until the identity of the persons to take is determined.

The prior estate held by the executors, as trustees, falls with the gift. No portion of the estate was to be parted with during this period; the "surplus" was to be collected and reinvested; all was to pass as a part of the ultimate gift; the accumulations could not vest in any one during the twenty-one years. Both capital and income reach the same destination, and at the same time; the gift comprising both is void. The Act of April 18, 1853, P. L. 503, prohibits accumulations except during minority, and, as there are no beneficiaries whatever during the prior period, such accumulations are contrary to the statute (see Billing's Est., No. 2, 268 Pa. 71, 74); the provisions of item 10 are merely a means toward the ultimate end, to wit, accumulating and capitalizing the vast income for the sole benefit of the ultimate gift, and such means must fall with the result here condemned. There were no intervening gifts or directions for the application of money during the prior estate, saving, of course, the small bequests and directions noted above; and those with reference to the farm

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are not gifts,—they relate to keeping intact a part of the residuary estate.

A resulting trust thus arises in the heirs at law and next of kin when the gift and prior estate disappear. For the purpose of mere conservation and accumulation, equity would no longer continue the operation of the trust; the legal and equitable titles merge; there is no discretion vested in the trustee: *Koenig's App.*, 57 Pa. 352, 355; *Conley's Est.*, 197 Pa. 291, 295.

But the appellant contends that the case is ruled by *Whitman's Est.*, 248 Pa. 285, 288, 289. It has been held that where the provisions creating the particular estate in trust are inseparable and dependent parts of the testator's main scheme to tie up his residuary estate in the ultimate gift, and thereby prevent the vesting until a date too remote, such provisions, including all the agencies or means designed to accomplish the desired and forbidden end, are void under the rule (*Johnston's Est.*, 185 Pa. 179; *Gerber's Est.*, 196 Pa. 366; *Kountz's Est.* (No. 1), 213 Pa. 390). It does not follow that, simply because the ultimate interests are void, the prior interests too must collapse; only offending limitations are void. "A prior estate neither receives enlargement nor suffers diminution when a remainder expectant upon it is declared void for remoteness (*Lewis on Perp.* 420; *Johnston's Est.*, 185 Pa. 179); but in Pennsylvania, where the limitations of the prior and ulterior estates are so intimately and inseparably intertwined that the failure of the limitation of the latter disturbs the main and dominant purpose of the testator, of which the prior limitations are a part, such prior and ulterior estates are void; so, too, where the prior estate is but a mere agency to accomplish a transgression of the rule.

In the cases just noted, the wills directed payments in the prior estate much more specific than here, where there is none. In *Whitman's Est.*, *supra*,—where the bequest was to the wife, if living, and, upon her death, to his daughter for life, free from the control of her hus-

band, and, upon the death of the daughter, to divide the principal among the latter's children in equal shares, the shares of the males to be paid to them on attaining majority, while those of the females were to continue under the same trust as to the daughter, with the remainder over to charitable institutions, if no heirs,—this court sustained the prior estates to the wife and daughter. We held the limitation over to the female grandchildren was merely incidental; the prevailing purpose of the will was to take care of the wife and her daughter; the only phase bringing it under the rule was, if female children should survive; if there should be all male children, or no children, which this court could not then determine, the will under consideration would not have offended the rule. But there is nothing in the particular estate under Lilley's will paralleling those in the Whitman case. There are no benefactors to receive any of the income accruing during the term of the particular estate.

It seems quite clear that, for the reasons here mentioned, the prior estate falls with the ultimate one, because they are dependent and inseparable parts of testator's main scheme and dominant purpose to make a gift of his residuary estate, so that the same shall vest at a period too remote under the rule.

Appellants urge that the benefaction in favor of the Lilley Company in item 10 is not associated with the residuary disposition, but is exclusively associated with admittedly valid specific bequests in other items of the will, or, if regarded as associated, it is certainly plainly separable therefrom; in any event, item 10 does not violate the rule against perpetuities. The part of it bearing specifically on the matter before us is the following: "All other coal that I own or have an interest in can [may] be opened up any place that suits the company, and worked on a royalty to suit the company."

Appellants' contention rests on a mistaken conception of the true purpose of item 10. Its provisions contem-

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plate a sale of coal lands on a royalty basis, and it is a part of testator's plan whereby he raises, during the period of ninety-nine years, a large estate that cannot vest until a remote period, unlawful under the rule. Item 10 is the chief instrument to accomplish this illegal purpose, for, on the acreage mentioned, with mining conducted as effectively as under the present leases, an enormous estate would be worked out, the principal from this land alone yielding upwards of \$2,750,000. The reinvestment of interest and accumulations each year, or the compounding of the yearly revenues, would raise, with the liquid estate now at hand, a sum of money that would be staggering, to say the least, as it appears to those of us who are not used to dealing in personal matters with such large figures. The average yearly income, as the present record would indicate, would amount to from \$150,000 to \$200,000.

Testator, through stock control in the company on one hand, and his legal representatives on the other, would take care of the royalties to realize the greatest possible benefit to his estate from the Ross Block of coal. Can it be doubted item 10 was drafted solely in aid of testator's primary purpose? The company was not to be benefited, nor its stockholders; nor were its small minority stockholders to be considered as specific beneficiaries. The will was not written with any idea of an association between item 10 and these shareholders. Testator did not consider relatives or persons; his mind was fixed on one specific object,—the amassing of a great estate, to be divided as his ultimate gift at the end of ninety-nine years. He surrounds these thoughts and ideas with every protection possible. His right hand guards his left. Instead of leasing to an independent company, one is selected that he practically owns; his estate thereby reaps the reward both ways through dividends as well as royalties. And every dollar from this great source of income goes into the residuary estate without the subtraction of a single cent. His dead hand is kept on it

throughout the entire period of ninety-nine years; the stock of the Lilley Company owned by him shall be held in his estate and shall not be transferred. Can it be doubted that the association of item 10 with the residuary estate was complete? In fact the item was created as one of the great channels through which the revenues from his vast holdings would pass.

But, if we consider item 10 separable from the will as a whole, it may be considered an option or a discretionary power, or a sole testamentary right in the Lilley Company to receive something.

"Other coal may be opened up and worked on a royalty to suit the company" is not a devise of coal upon condition subsequent, vesting immediately upon death, subject to acceptance of the condition by the beneficiaries within a reasonable time. It lacks the necessary word and elements to make it such. It has none of the properties of a gift, and he who seeks to take against the law of descent must show a satisfactory written title: *Brendlinger v. Brendlinger*, 26 Pa. 131, 132. The devise of the coal, upon royalty "to suit," as a condition subsequent, requires fixing the price before payment of that amount. But this cannot arise until the company has elected to take the land and the price has been fixed; until such election and fixing of royalty, the fee simple title cannot vest. "It seems to be of the very nature of a right to elect one of two things, that actual ownership is not acquired in either until it be elected": *Ludwick's Est.*, 269 Pa. 365, 369. The authorities cited by appellant in this connection are not in point.

Royalty, as here used, means more than fixing a sum payable. It involves all the features usually incident to and included in the leasing of coal land, and primarily contemplates a contract, the essential ingredients of which are offer and acceptance, form and consideration, parties, etc. Until this is complete, no title would vest in the company. Under this situation, as we have already said, the executors must determine all matters

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in connection with the contract. They pass on the necessity, time, price and other matters. It is not to be thought this matter was left solely to the discretion of the company, who might fix any amount (one cent, for example) as royalty. It is not to be supposed testator intended to thus deplete his ultimate great fund, or the company could go where and as often as it willed over the surface land to open the coal. It may be said reasonableness is all that is required.

The power lodged in the executors to so act was not mandatory, but permissive or discretionary; it is conceded item 10 is not self-executing, even by the interpolation of the language suggested by appellant, though that would be helpful. That the Lilley Company so regarded item 10, appears by the resolution and tender of contract. In dealing with the "other" coal, the company must be given the first chance. But the vice of it all is, a power was conferred on the executors to act for the estate during ninety-nine years. Now, the avowed purpose of the exercise of these powers was to create the estate we have just mentioned, which could not vest within the limited period, and, because all the interests to be created by such exercise of powers were to take effect at the remote period, the powers, the means of its creation, fell with the interest to be created. There is no other reason for their existence, and the mere fact that an attempt was made to execute them within the time, would not avail, as they spoke from testator's death, and the rule is tested by possibilities, not actualities: Foulke, sections 335, 403 and 438; Coggins's App., 124 Pa. 10; Phila. v. Girard's Heirs, 45 Pa. 11, 27; Williams on Real Property, 22d ed., section 319.

Considered as an option to open up and work the coal of testator's land, there is no obligation to open, mine and pay royalties. All must be predicated on an agreement, and there is no time specified for it or for the acceptance of the option,—neither may ever be accomplished. Not only would the right to accept the

property be held for the period of twenty-one years, but it may continue for an indefinite time throughout ninety-nine years. The Lilley Company has elected to open up the Ross coal; there was another tract included in the term "other coal." When will the company elect to open this coal? Does it ever intend to do so? It seems to us this question has been fully answered by this court in *Barton v. Thaw*, 246 Pa. 348, where the covenant to sell was in the form of an option, without limit as to time of acceptance, and, while an option is a species of property subject to testamentary control (*Remensnyder's Est.*, 267 Pa. 348, 350), it is not such where there is an absence of a limited time within which to accept it. The event upon which the estate was to arise, to wit, the acceptance of the option, is uncertain, being unconfined as to limit of time, the interest created thereunder is contingent and within the rule against perpetuities.

The fact that the option has been accepted within the twenty-one-year period cannot be considered; the court deals with the facts as they exist at the time of testator's death; such option is wholly void *ab initio* as to all privileges and interests attempted to be granted or appertaining thereto.

Conceding the powers to execute void, with the heirs and next of kin to take the ultimate estate arising therefrom at testator's death, with the will stripped of everything but the supposed testamentary right in the Lilley Company to get something, no effect can be given to this supposed right. It is based on testator's ultimate thought, so closely interwoven therewith that it is fairly to be assumed no such right would ever have been created had testator known that his ultimate gift was to fail. The general purpose of the will was unlawful, and we may add that such contingent testamentary right or interest thus left in item 10 is so indefinite and uncertain as to be unenforceable for any purpose; thus concluding, item 10 is invalid, illegal and void. Testator died intestate as to his residuary estate; it passes under

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the law to his heirs and next of kin, Jane Elliott and the two Lilley nephews in fee.

Decree affirmed at appellant's costs.

**Nupp v. Estep Brothers Coal Mining Co. et al.,
Appellants.**

Workmen's compensation—Injury—Death—Reduction of payments—Widow—Act of June 26, 1919, section 306, P. L. 642, 646.

1. Under the Act of June 26, 1919, P. L. 642, 646, where a workman, after having received weekly compensation for a number of weeks, dies as a result of his injuries, the only period which should be reduced by reason of payments to the deceased in his lifetime, is the period of three hundred weeks during which compensation is payable to his widow.

2. The act does not provide for a double deduction from the widow and children.

Argued October 4, 1921. Appeal, No. 65, Oct. T., 1921, by defendants, from judgment of C. P. Indiana Co., Sept. T., 1920, No. 233, approving decision of Workmen's Compensation Board, affirming award of referee in case of Alice Nupp v. Estep Brothers Coal Mining Co. et al. Before MOSCHZISKER, C. J., FRAZER, WALLING, SIMPSON, KEPHART, SADLER and SCHAEFFER, JJ. Affirmed.

Appeal from decision of Workmen's Compensation Board. Before LANGHAM, P. J.

The opinion of the Supreme Court states the facts.

Decision of Workmen's Compensation Board affirmed. Defendants appealed.

Error assigned, inter alia, was judgment, quoting it.

Frank P. Martin, for appellant.

J. W. Leech, of *Leech & Leech*, for appellee.

OPINION BY MR. JUSTICE SCHAFFER, January 3, 1922:

The amending Workmen's Compensation Act of June 26, 1919, P. L. 642, 646, section 306, provides: "Should the employee die as a result of the injury, the period during which compensation shall be payable to his dependents, under section three hundred and seven of this article, shall be reduced by the period during which compensation was paid to him in his lifetime, under this section of this article."

Irvin Nupp, an employee of defendant, was injured on December 23, 1918, and died March 3, 1920, as a result of his injuries. He had received compensation for a period of fifty-eight weeks at the rate of ten dollars per week under the Act of 1915. He left to survive him a widow and four children.

The insurance carrier of defendant claimed, under the section of the act quoted, that the period during which compensation is payable to the widow, three hundred weeks, should be reduced fifty-eight weeks, by reason of the payments made to the husband while he lived, and that, at the end of the two-hundred-and-forty-two-week period, during which the widow will be entitled to receive compensation, payment should be commenced to the children, but that payment to them should terminate, with respect to each child, fifty-eight weeks prior to its sixteenth birthday. An agreement to this effect having been tendered the widow, she refused to sign it, and a claim petition was filed with the compensation referee, who declined to find as defendant requested, and held that the only period which should be reduced, by reason of payments to the decedent in his lifetime, was the period of three hundred weeks during which compensation was payable to the widow, and that, at the end of the two-hundred-and-forty-two-week period, during which payments were to be made to her, payments should be made to the children until each child not then sixteen years of age should reach that age. This finding was approved by the compensation board and by the com-

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mon pleas on appeal to it; from the action of the latter, the defendant brings this appeal.

To give effect to the contention of appellant would be in the teeth of the explicit terms of the act, section 307, subsection 7, which provides, "the compensation of each child shall continue after said period of three hundred weeks until such child reach[es] the age of sixteen." Two of the children will be under sixteen years of age when payments cease to the widow; the effect of giving to the section of the act under consideration the construction contended for, would be to stop the payments, not when the act says they shall cease, when these children are sixteen years old, but when they are fourteen years and ten months old. The answer to this contention is that the law is not so written.

The act does not provide for the double deduction from the widow and the children, but that "the period," thereby meaning in this case the three-hundred-week period, shall be reduced "by the period" during which the deceased received compensation in his lifetime.

The judgment of the court below was correct and we affirm it.

Nesbitt, Appellant, v. Clark et al.

Corporations—Penal statutes—Failure of directors to file reports—Conflict of laws—Comity—"Full faith and credit" clause of Federal Constitution.

1. A penal statute is one which imposes a penalty or forfeiture for transgressing its provisions, or for doing a thing prohibited, and it is none the less a penal statute because it is also remedial. Such statutes are not enforced outside of the states enacting them.

2. The liability of directors of a corporation to file reports, is penal, and as a rule will not be enforced by courts of other states.

3. A statute of Colorado providing that, if a corporation shall fail to file an annual report within a specified time, the directors and officers shall be liable for all debts of the company contracted during the preceding year, is penal in character, and will not be

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enforced by the Pennsylvania courts against directors resident in Pennsylvania.

4. Such an act being hard and severe should be construed with great strictness.

5. If a Colorado court has, under a given state of facts, held it to create a contractual liability, and not to impose a penalty, the courts of another state, when called upon to enforce the statute, should not so construe it, unless the facts are substantially the same.

6. The Pennsylvania courts will not follow a decision of the Colorado Supreme Court construing the act not to be penal, where all the preceding cases in the same court have held it to be penal, and the wording of the act itself shows the penal character, if the decision in question makes no attempt to distinguish the preceding cases, or to overrule them, makes no mention of the legislative interpretation of the act, and the facts in the case are not similar to those in the Pennsylvania suit.

7. A foreign court is not bound to apply the doctrine of comity where the highest court of the other state has given different constructions to its statutes at different times and rights may have been acquired under the former construction.

8. The "full faith and credit" clause of the Constitution of the United States is not to be confused with the rule relating to the construction of statutes by comity so as to conform to the ruling of the highest court of the state which enacted the statute.

9. In the former, a state court is bound to recognize a judgment of another state; in the latter, where a judgment is not directly involved, the courts of a sister state will, by comity, under similar facts, and where the course of decisions has been uniform, adopt the decision of the highest tribunal of the state enacting the statute as the construction to be given the act.

Argued October 11, 1921. Appeal, No. 103, Oct. T., 1921, by plaintiff, from judgment of C. P. Allegheny Co., April T., 1921, No. 403, for defendants on question of law raised by affidavit of defense, in case of A. G. Nesbitt, ancillary administrator of estate of Walter R. Herrod, deceased, v. Charles H. Clark et al. Before MOSCHIZISKEB, C. J., FRAZER, WALLING, KEPHART, SADLER and SCHAFFER, JJ. Affirmed.

Assumpsit on promissory notes. Before STONE, J.
The opinion of the Supreme Court states the facts.

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Judgment for defendants on question of law raised by affidavit of defense. Plaintiff appealed.

Error assigned, inter alia, was judgment, quoting it.

Harvey A. Miller, of *Miller & Nesbitt*, for appellant.—The Pennsylvania courts should look to and follow the construction placed upon the statute in question by the highest court of Colorado: *Commercial Nat. Bank v. Kirk*, 222 Pa. 567.

The highest court of Colorado has held, as to actions brought by creditors of the corporation against its officers and directors, that this statute is remedial and enforceable against the officers and directors: *Credit Men's Adjustment Co. v. Vickery*, 62 Col. 214; *Interstate Savings & Trust Co. v. Wyatt*, 63 Col. 1; *Perini v. Oil Co.*, 68 Col. 564.

The refusal of the Pennsylvania courts to enforce the statute and decision of Colorado is a violation of the "full faith and credit" clause of the Federal Constitution: *Huntington v. Attrill*, 146 U. S. 657.

Huntington v. Attrill, supra, is regarded as the leading case on the points hereinbefore stated and decided. It is referred to as authority in the following cases: *Meeker v. R. R.*, 236 U. S. 412; *O'Sullivan v. Felix*, 233 U. S. 318; *Ward v. Com'rs*, 253 U. S. 17.

As further authorities, both on the question that the statute of Colorado is remedial and that from an international standpoint it should be enforced by the Pennsylvania courts: see *Hancock Nat. Bank v. Farnum*, 176 U. S. 640; *Whitman v. Bank*, 176 U. S. 559; *Royal Arcanum v. Green*, 237 U. S. 531.

John M. Freeman, of *Watson & Freeman*, with him *James L. Weldon*, *Thorp*, *Boswick & Stewart*, *A. M. Simon* and *Herbert D. Lent, Jr.*, for appellees.—Penal laws are not enforceable outside of the state creating them: *Commercial Nat. Bank v. Kirk*, 222 Pa. 567; *The Antelope*, 10 Wheat. 66; *Flash v. Conn.*, 109 U. S. 371.

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The statute of Colorado, on which the liability of defendants is based, is unquestionably a penal statute and not enforceable outside of that state: *Brown v. Kildea*, 58 Wash. 184; *Adams v. R. R.*, 67 Vt. 76; *Chase v. Curtis*, 113 U. S. 452.

This act has been uniformly held penal by the courts of Colorado, and the decisions of that court, while not binding on this court, are to be given weight in determining the character of the act: *Gregory v. Bank*, 3 Col. 332; *Clough v. Oil Co.*, 25 Col. 520.

The decisions of other states where this question has arisen are substantially uniform in holding that statutes of this particular type are penal and not enforceable outside of the state enacting them: *Cary v. Schmeltz*, 141 Mo. App. 570; *First Nat. Bank of Plymouth v. Price*, 33 Md. 487; *Derrickson v. Smith*, 27 N. J. L. 166; *Wisconsin v. Ins. Co.*, 127 U. S. 265.

OPINION BY MR. JUSTICE SCHAFFER, January 3, 1922:

Plaintiff, as ancillary administrator of Walter R. Herrod, deceased, brought suit against defendants, to recover the amount represented by four promissory notes, given by the Ward Mining & Milling Company, a corporation of the State of Colorado, to Herrod in his lifetime. The liability of defendants, who are alleged to be officers and directors of that company, is asserted under a statute of Colorado, which provides, in substance, that if any corporation shall fail to file an annual report in the office of the secretary of state, within sixty days after January first of each year, the officers and directors of the corporation shall be liable for all debts of the corporation, contracted during the preceding year, and until the report shall be filed. It is alleged the report required was not filed. The contention of the plaintiff is that the statute in question is remedial as to creditors of the corporation, and therefore enforceable in Pennsylvania against defendants as its officers and directors; where-

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as, by their affidavit of defense, defendants take the position that the statute is penal, and therefore not enforceable here. The court below determined the case accordant with the latter view and entered judgment for defendants; plaintiff appeals.

It is well settled that penal laws of one state can have no operation in another: *The Antelope*, 10 Wheaton 66; *Flash v. Connecticut*, 109 U. S. 371.

In *Commercial National Bank v. Kirk*, 222 Pa. 567, where an action was brought to enforce a liability under a Montana statute, similar to the one now before us, it was said, "The right to recover as a personal obligation against directors in this State depends upon the nature of the liability under the Montana statute, which, if penal, must be enforced in that jurisdiction."

The trend of judicial decisions in Pennsylvania has always been against the enforcement within this Commonwealth of the penal enactments of other countries and states. In our early case of *Commonwealth v. Halloway*, 1 S. & R. 392 (1815), it was held that penal statutes of another country will not be enforced here, even against one who by contract has agreed to be subject to them. There it appeared a seaman had shipped in a British port, under articles in which he agreed to be subject to certain British statutes authorizing the arrest and imprisonment of sailors who deserted their ships. The seaman left his ship when it reached Philadelphia; he was arrested and committed by an alderman until security should be entered that he would continue on the voyage. In habeas proceedings it was held by Chief Justice TILGHMAN that the commitment was illegal, notwithstanding the contract by which the imprisoned sailor had agreed to be subject to the penal statute of Great Britain authorizing such imprisonment.

Appellees contend that the liability imposed by the Colorado statute is penal. Whatever may be the conclusion as to this, it is a harsh and severe law. The neglect of an official to file the report provided by the act may

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cause the ruin of perfectly innocent directors, although they may have directed the report to be filed. The debts for which they will be made liable may have been contracted before the date fixed for filing the report, and the neglect to file it may have misled nobody, yet the directors are fixed with liability. Such an act should be construed with great strictness. If a Colorado court has, under a given state of facts, held it to create a contractual liability, and not to impose a penalty, the courts of another state, when called upon to enforce the statute, should not thus construe it, unless the facts involved are substantially the same.

In *Credit Men's Adjustment Co. v. Vickery*, 62 Colorado 214, the Supreme Court of Colorado was presented with the question whether an assignee of a demand,—arising under the act, against directors of a corporation,—could collect, it being urged that he could not, because the claim was for a penalty, and therefore unassignable. The court ruled that the demand, under the circumstances there shown, was not for a penalty, and could be collected. In the course of the opinion, it was said, "This kind of a statute imposing a liability on directors for the debts of a corporation for failure to file a report, is, broadly speaking, penal in character, although not such in the strict sense of that term. . . . Within the statute of limitations, and, for the purpose of determining the liability of directors, it is as to them in the nature of a penalty; but when the facts bring the case against the directors clearly within the statute, it affords relief to creditors, and, as to them, is remedial in character. The courts of this State have often considered the statute from the side affecting directors, and as to them uniformly held it to be penal in its nature. Here the directors' liability is admitted [just how or why the opinion does not disclose], and we are now confronted with the question which requires a consideration of the statute from the viewpoint of creditors in enforcing the liability. . . . In some respects the statute is penal.

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while in others it is remedial in character. *Penal in its nature as to the directors for the purpose of determining their liability*, and to be strictly construed. When the liability is clearly shown, it is remedial in character as to creditors, and to be liberally construed in its enforcement."

We confess, that the reasoning by which the court reached the conclusion, that the statute is not penal, is not altogether clear to us; particularly is this so when we take into account that, in all the other cases in which the act has been considered by the Colorado courts, the liability imposed has been construed as penal.

Under an earlier, but similar, act in *Gregory v. Bank of Denver*, 3 Colorado 332, it was said, "The liability of the trustees, arising from a failure to publish an annual report, is in no way related to the loss that creditors of the company may sustain by reason of such violation of the statute. The joint and several liability attaches to the trustees, not because creditors of the company contracted with them, not because the corporation is insolvent, but because they neglected to perform a duty enjoined by law. It cannot be said that creditors of the company contracted with reference to any indemnity afforded by this section. . . . This statute is in its nature penal." *Clough v. Rocky Mountain Oil Co.*, 25 Colorado 520, was a joint action, brought against the corporation and its directors who had failed to file an annual report. The court said: "Therein the parties defendant were improperly joined because the liability of the corporation defendant was based upon a contract, while that of the directors arose from a tort, being based upon a penalty imposed for a failure to perform a statutory duty." *Steck v. Prentice*, 43 Colorado 17, held that the act did not apply to corporations not for profit, the court saying: "Statutes imposing noncontractual liability upon officers or stockholders of a corporation for such defaults are penal in their nature and strictly construed." *Hazleton v. Porter*, 17 Colorado App. 1; *Woodworth v.*

Henderson, 28 Colorado 381, and Dart v. Hughes, 49 Colorado 465, held that the one year statute of limitations, which applied to actions for recovery of penalties, applied to actions brought under the statute against directors. In the cases of Colorado Fuel & Iron Co. v. Lenhart, 6 Colorado App. 511, and Fairbanks, Morse & Co. v. MacLeod, 8 Colorado App. 190, it was held that the liability of directors was penal and not contractual. Beside these various judicial interpretations of the act, the legislature of Colorado, in the very act itself has construed the liability, imposed by the first paragraph, as a penalty, when it uses, in the second paragraph, the significant words "as a further penalty" and "in addition to which penalty." By no process of reasoning can these words refer to anything other than the liability imposed in the first paragraph on directors who have failed to comply with the provisions of the act.

It is significant that in the case of Credit Men's Adjustment Co. v. Vickery, 62 Colorado 214, no reference is made to the numerous previous cases in which the act was construed as penal, no attempt was made to distinguish them, or to overrule them, and no mention was made of the legislative interpretation of the act. Under such circumstances, a court of another state may well decline to apply the rule of comity to the decision in that case. A foreign court is not bound to apply the doctrine of comity where the highest court of the other state has given different constructions to its statutes at different times, and rights may have been acquired under the former construction: *Fairfield v. Gallatin*, 100 U. S. 47, 50.

The "full faith and credit" clause of the Constitution of the United States is not to be confused with the rule relating to construction of statutes by comity so as to conform to the ruling of the highest court of the state which enacted the statute. In the former, a state court is bound to recognize a judgment of another state; in the latter, where a judgment is not directly involved,

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the courts of a sister state will, by comity, under similar facts and where the course of decisions has been uniform, adopt the decision of the highest tribunal of the state enacting the statute, as to the construction to be given the act.

Great reliance is placed by appellant, and was likewise placed by the Colorado court, in *Credit Men's Adjustment Co. v. Vickery*, 62 Colorado 214, on the case of *Huntington v. Attrill*, 146 U. S. 657, as sustaining the contractual liability of directors under the act in question. In *Huntington v. Attrill*, a judgment was recovered by the plaintiff in New York. The defendant Attrill, was a promoter and incorporator of a company, and filed a certificate, required by the New York statute, to the effect that the whole stock of the corporation had been paid in, which was in fact false. Huntington had loaned to the company \$100,000 after its incorporation, but before the certificate had been filed. The statute provided that a director filing such false certificate should be liable for all debts of the corporation contracted while he was director. Huntington recovered against Attrill a judgment for his debt, and the latter concealed and conveyed his assets to members of his family. A bill in equity was filed in the Maryland court for discovery and to enforce the New York judgment. The Maryland court dismissed the bill, on the ground that the claim against Attrill was a penalty and, as such, unenforceable. This decree of the Maryland court was reversed by the Supreme Court of the United States, because a judgment of the New York court, construing the act, was directly attacked in the Maryland court; holding that the Maryland court was bound by the "full faith and credit" clause of the Federal Constitution, and was in error in refusing to enforce the judgment. Whether the New York statute involved a penalty, or merely imposed a contractual liability, was entirely immaterial to the case so far as its ultimate decision was concerned, since what was being enforced was a judgment.

In the present case, we are asked to enforce a claim under this harsh act, against citizens of our own State, solely on the ground that in the case cited, *Credit Men's Adjustment Co. v. Vickery*, 62 Colorado 214, the Supreme Court of Colorado has determined the act not to be penal. While it might be that, under precisely similar facts, we would follow the rulings of another state construing such an enactment, such is not the situation here for the reason that the citadel of resistance to the act, as being penal, was abandoned in the case cited, by its being conceded the directors were liable, and actions were brought by original creditors against them. The Colorado court in that case was considering an assignment of admittedly valid claims to some of its own citizens; the facts in the instant case are not similar, and, as heretofore pointed out, the reasoning by which the Colorado court arrived at its conclusion, as to the act not being penal, is not satisfying to us, nor do we think it in accord with the weight of authority. In our view, the correct rule of construction of statutes, such as the one in question, is that stated in *Fletcher on Corporations*, vol. 6, p. 7228: "If a statute commands or prohibits some act, and imposes individual liability upon stockholders for violation of the command or prohibition, as a punishment, the liability is penal, and not contractual, although the statute also provides a remedy in favor of creditors for enforcing the penalty. A penal statute is one which imposes a penalty or forfeiture for transgressing its provisions, or for doing a thing prohibited, and it is none the less a penal statute because it is also remedial." The rule is thus stated in *Beale on Conflict of Laws*, vol. 3, p. 519: "The statutory liability of directors in a corporation may also be either contractual or penal. Thus, the director's liability for all debts contracted beyond the capital paid in, is an original liability entered into by the director each time such a debt is contracted; being contractual, it may be enforced in any state; but liability imposed upon a director for

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debts already contracted, because of his failure to file proper returns, is obviously penal, since the liability bears no proportion either to the amount of harm done by his act or the creditor's loss by it. It is accordingly usually held that it cannot be enforced in another state." Cook on Corporations, 6th ed., p. 616, thus sums up the rule on the question under consideration: "A different rule prevails as to the statutory liability of corporate officers for failure to file reports. . . . Such liability is generally construed to be penal, and will not be enforced by the courts of other states."

If nonresident directors can be held liable for corporate debts extraterritorially, because of the failure of a corporate officer to discharge a ministerial duty, and if, under any and all circumstances, we are bound to follow the construction of the court of another state, that the statute,—it matters not how it may in fact penalize the innocent director,—is not penal, it is difficult to see where liability would cease; for, if it can be made to attach to directors, it can be made to attach to stockholders, and nonresident stockholders, ignorant of what officers of the corporation may have failed to do, could be penalized by great financial loss, although never within the state whose laws inflict it, by an act which, if passed in our own State, would be held by us to be penal. Certainly no such rule prevails where, as here, the facts differ and the decision we are asked to follow is irreconcilable with others, made by the court of last resort of the state in question. Under the facts before us, we are not obliged by any rule to construe this highly penal statute as not penal, and thus punish our own citizens, and we shall not do so.

The judgment is affirmed.

Iron Trade Products Co. v. Wilkoff Co., Appellant.

Contracts—Sale—Nonperformance—Difficulty of performance—Limited quantity in market—Damages—Measure of damages—Sales Act of May 19, 1915, P. L. 543, 562.

1. If a party, seeking to secure all the merchandise of a certain character which he could obtain, enters into a contract for a quantity of such goods, and subsequently makes performance of the contract by the seller more difficult by making other purchases which increase the scarcity of the available supply, his conduct, in the absence of any intent to embarrass or interfere with the seller, will furnish no excuse to the latter for refusal to perform the contract. Mere difficulty of performance will not excuse a breach of contract.

2. Where there is an available market in which to procure goods that were not delivered, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market price at the time and place for delivery, or, if no time was fixed, then at the time of the refusal to deliver, as provided by the Sales Act of May 19, 1915, P. L. 543, 562.

3. If the vendee procures the goods elsewhere, at less than the market value, his measure of damages is limited to the amount he expended therefor in excess of the contract price.

4. If, however, he resells the goods, the price, on the resale, is not to be taken as the basis for damages for the breach of delivery, unless made part of the contract.

Practice, C. P.—Affidavit of defense—Contradictory or equivocal averments—Sale.

5. An affidavit of defense must be considered as a whole, and a general denial therein is of no avail. An affidavit that is contradictory or equivocal is insufficient.

6. In an action for failure to deliver goods under a contract of sale, an affidavit of defense is insufficient, which, on the question of damages, denies generally that there was any market or market price for such goods, but admits facts which show that there was a market price.

Argued October 12, 1921. Appeal, No. 56, Oct. T., 1921, by defendant, from order of C. P. Allegheny Co., Jan. T., 1921, No. 216, making absolute rule for judg-

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ment for want of a sufficient affidavit of defense, in case of Iron Trade Products Co. v. Wilkoff Co. Before MOSCHZISKE, C. J., FRAZER, WALLING, KEPHART, SADLER and SCHAFER, JJ. Affirmed.

Assumpsit for breach of contract to deliver steel rails.

Rule for judgment for want of a sufficient affidavit of defense. Before REID, J.

The opinion of the Supreme Court states the facts.

Rule absolute. Defendant appealed.

Error assigned, among others, was order, quoting it.

A. O. Fording, for appellant.—One who impedes the performance of a contract by another, cannot take advantage of his own wrong to prevent a recovery: *Kress Co. v. Hogg Co.*, 263 Pa. 191, 195; *U. S. v. Peck*, 102 U. S. 64.

If plaintiff was entitled to recover at all, he was entitled only to the amount of profit that he would have made on the resale to which he was committed, after our full performance.

Even if there had been no waiver of damages on part of the second vendee in favor of his vendor, the rule of market value could not be applied in our case because there was no market, and no price or value referable to a market: *Theiss v. Weiss*, 166 Pa. 9; *Seward v. Pa. Salt Mfg. Co.*, 266 Pa. 457.

E. B. Strassburger, for appellee.—Default in delay is not excused because performance has become difficult, dangerous or burdensome: *Beecher v. Stein*, 139 Pa. 570; *Chicago, M. & St. P. R. R. v. Hoyt*, 149 U. S. 1.

The measure of damages claimed is correct and the denial thereof contradictory and evasive: *Honesdale Ice Co. v. Imp. Co.*, 232 Pa. 293; *Arnold v. Blabon*, 147 Pa. 372; *Seward v. Mfg. Co.*, 266 Pa. 457; *Theiss v. Weiss*, 166 Pa. 9; *Morris v. Supplee*, 208 Pa. 253, 260.

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It is of no concern to a defaulting seller what disposition a buyer intended to make of the goods sold, or what settlement he has made of his contract to resell the same: *Seward v. Mfg. Co.*, 266 Pa. 457.

OPINION BY MR. JUSTICE WALLING, January 3, 1922:

In July, 1919, plaintiff entered into a written contract with defendant for the purchase of twenty-six hundred tons of section relaying rails, to be delivered in New York harbor at times therein specified, for \$41 a ton. Defendant failed to deliver any of the rails and plaintiff brought this suit, averring, by reason of such default, it had been compelled to purchase the rails elsewhere (two thousand tons thereof at \$49.20 per ton and six hundred tons at \$49 per ton), also that the market or current price of the rails at the time and place of delivery was approximately \$50 per ton, and claiming as damages the difference between what it had been compelled to pay and the contract price. Defendant filed an affidavit of defense and a supplement thereto, both of which the court below held insufficient and entered judgment for plaintiff; from which defendant brought this appeal.

In effect, the affidavit of defense avers the supply of such rails was very limited, there being only two places in the United States (one in Georgia and one in West Virginia) where they could be obtained in quantities to fill the contract, and that, pending the time for delivery, defendant was negotiating for the required rails when plaintiff announced to the trade its urgent desire to purchase a similar quantity of like rails, and, in fact, bought eight hundred and eighty-seven tons and agreed to purchase a much larger quantity from the parties with whom defendant had been negotiating; further averring this conduct on behalf of plaintiff reduced the available supply of relaying rails and enhanced the price to an exorbitant sum, rendering performance by defendant impossible. The affidavit, however, fails to aver knowledge on part of plaintiff that the supply of rails was

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limited or any intent on its part to prevent, interfere with or embarrass defendant in the performance of the contract; and there is no suggestion of any understanding, express or implied, that defendant was to secure the rails from any particular source, or that plaintiff was to refrain from purchasing other rails; hence, it was not required to do so. The true rule is stated in *Williston on Contracts*, p. 1308, as quoted by the trial court, viz: "If a party seeking to secure all the merchandise of a certain character which he could, entered into a contract for a quantity of the required goods, and subsequently made performance of the contract by the seller more difficult by making other purchases which increased the scarcity of the available supply, his conduct would furnish no excuse for refusal to perform the prior contract." Mere difficulty of performance will not excuse a breach of contract: *Corona C. & C. Co. v. Dickinson*, 261 Pa. 589; *Janes v. Scott*, 59 Pa. 178; 35 Cyc. 245. Defendant relies upon the rule stated in *United States v. Peck*, 102 U. S. 64, that, "The conduct of one party to a contract which prevents the other from performing his part is an excuse for nonperformance." The cases are not parallel; here, plaintiff's conduct did not prevent performance by defendant, although it may have added to the difficulty and expense thereof. There is no averment that plaintiff's purchases exhausted the supply of rails, and the advance in price caused thereby is no excuse. The *Peck* case stands on different ground, there *Peck* contracted to sell the government a certain quantity of hay for the Tongue River station, and the trial court found it was mutually understood the hay was to be cut on government lands called "the Big Meadows," in the Yellowstone Valley, which was the only available source of supply; also that thereafter the government caused all of that hay to be cut for it by other parties. In view of this *Peck* was relieved from his contract.

The affidavit "denies that there was any market or market price, or current price for such relaying rails,"

at any time from the date of the contract to the beginning of this suit, but other statements therein amount to an admission of a market price. For example, it speaks of "the trade in Pittsburgh, New York and other centers of such trade," also of "the very small quantity of such rails in the market." The affidavit further states that, "After making the said contract with the plaintiff the defendant began negotiations with the persons from whom the said rails in Georgia and West Virginia might be purchased; and in each of the two cases referred to such negotiations had proceeded so far that defendant could have purchased twenty-six hundred tons of such rails either in Georgia or West Virginia, at some such price as that contracted to the plaintiff, or less, or not greatly in excess thereof.

"In fact the plaintiff bought a quantity of such rails, to wit, eight hundred and eighty-seven tons, and at one time had contracted for the purchase of a much larger quantity thereof, from the same persons with whom the defendant had been negotiating for the same, and at higher prices than had been offered to the defendant by the same persons within the term of the said contract.

"And affiant, while denying as aforesaid that the plaintiff was compelled to purchase the said rails or any of them, avers that if the plaintiff was so compelled it was only as the result of plaintiff's own interference with the defendant's performance of the said contract; and avers that but for the said interference the defendant would have made full performance of its said contract."

The above, and the admitted facts that plaintiff actually bought the twenty-six hundred tons and had previously resold the same, indicate a market value, and the specific averment thereof in the statement of claim is not sufficiently denied in the affidavit. An affidavit of defense must be considered as a whole, and therein a general denial is of no avail against an admission of the same fact. An affidavit that is contradictory or equivo-

cal is insufficient: see *Noll v. Royal Exchange Assurance Corp.*, 76 Pa. Superior Ct. 510.

The supplemental affidavit avers that, when the contract in suit was made, plaintiff, to the knowledge of defendant, had resold the twenty-six hundred tons of rails at \$42.25 per ton and, furthermore, that the purchaser at such resale released plaintiff from all claim for damages under the contract. In an action by a vendee for failure to deliver goods according to contract, the usual measure of damages is the difference between the contract price and the market value at the time and place of delivery: *Seward v. Pa. Salt Mfg. Co.*, 266 Pa. 457, 461, and cases there cited; also *Hauptman v. Pa. W. Home for Blind Men*, 258 Pa. 427. This rule is stated in clause 3d of section 67 of the Sales Act of May 19, 1915, P. L. 543, 562, as follows, viz: "Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."

However, where in such case the vendee procures the goods elsewhere, at less than the market value, his measure of damages is limited to the amount he expended therefor in excess of the contract price: *Theiss v. Weiss*, 166 Pa. 9, 19; *Morris v. Supplee*, 208 Pa. 253, 260. Defendant contends the rule of damages above stated does not apply here because of plaintiff's contract for resale, and that in no event can plaintiff recover more than would have been its profits thereon. In support of which *Trigg v. Clay*, 88 Va. 330, is cited. That decision, however, is expressly based upon the absence of a market at which lumber, similar to that contracted for, could have been obtained. For that reason, the price at which plaintiff had resold the lumber was accepted as a satisfactory basis for ascertaining his damages. To like ef-

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fect is *B. P. Ducas Co. v. Bayer Co.*, 163 N. Y. S. 32. Defendant also cites *Foss v. Heineman*, 144 Wis. 146, which, while not in all respects parallel, may seem to support its contention; even so, we cannot follow it in view of our own rule as above stated. Plaintiff's vendee was not a party to the contract in suit, nor mentioned therein; and, while the rails in question were seemingly intended for him, other like rails would have filled his contract. The fact that a vendee has resold the goods contracted for is of no moment unless made a part of the contract; for, if not, he is entitled to the benefit of his bargain, regardless of the disposition he may intend to make of the property involved. To hold otherwise would inject collateral issues in trials for breaches of such contracts.

The assignments of error are overruled and the judgment is affirmed.

Bally, Appellant, v. Pittsburgh Rys. Co.

Negligence—Street railways—Licensee on car—Presumption from accident as to passengers—Work car—Wilful acts.

1. Where a person employed by a municipality as an inspector of repair work on the tracks of a street railway, is invited by the foreman of the railway company to enter a work car as a convenient place to eat his lunch, and is injured while the car is being shifted, he is a mere licensee, and the presumption of negligence on the part of the company arising where a passenger is injured during transportation, does not apply in his favor.

2. As plaintiff's duty did not require him to ride on a work car, there was no authority in the foreman to transport him or to invite him to enter the car.

3. The company owed him no duty except to refrain from injuring him by intentional, wanton, or wilful acts.

Argued October 12, 1921. Appeal, No. 121, Oct. T., 1921, by plaintiff, from order of C. P. Allegheny Co., Jan. T., 1920, No. 536, refusing to take off nonsuit, in case of

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William J. Bally v. Pittsburgh Railways Company, a corporation, now in the hands of Charles A. Fagan, W. D. George and S. L. Tone, receivers. Before MOSCHIZISKE, C. J., FRAZER, WALLING, KEPHAERT, SADLER and SCHAFFER, JJ. Affirmed.

Trespass for personal injuries. Before EVANS, J.

The opinion of the Supreme Court states the facts.

Nonsuit entered, which court refused to take off. Plaintiff appealed.

Error assigned, inter alia, was refusal to take off nonsuit, quoting record.

W. Heber Dithrich, with him H. Fred Mercer, for appellant.—Plaintiff was a passenger not for hire, and entitled to at least ordinary care: *Berkebile v. Traction Co.*, 255 Pa. 310; *Cody v. Venzie*, 263 Pa. 541; *Kierkowsky v. Connell*, 253 Pa. 566; *Reed v. Ry.*, 243 Pa. 562; *Coleman v. R. R.*, 242 Pa. 304.

William A. Challenger, with him Clarence Burleigh, for appellee.—Plaintiff was either a trespasser or, at most, a mere licensee: *Hagan v. Steel Co.*, 240 Pa. 222; *Ortlieb v. Poth*, 249 Pa. 270.

The accident itself did not raise a presumption of negligence: *East End Oil Co. v. Torpedo Co.*, 190 Pa. 351; *Lanning v. Rys.*, 229 Pa. 575; *Livingstone v. Rys.*, 64 Pa. Superior Ct. 593; *Allen v. Coal Co.*, 212 Pa. 54.

OPINION BY MR. JUSTICE FRAZER, January 3, 1922:

Plaintiff, an employee of the City of Pittsburgh, was engaged in inspecting repair work being done by the Pittsburgh Railways Company to its tracks in that city. At the invitation of the foreman in charge of the work, plaintiff entered a work car of the company for the purpose of eating his noonday lunch; while so engaged, the car was moved for the purpose of shifting two cars, one

containing gravel and the other cement. The foreman of the railways company informed plaintiff the work car would return in a few moments and he might remain and finish his lunch during the shifting process. The car was moved forward some distance, attached to the two loaded cars, and, while returning to the starting point, running down grade, the motorman lost control of the motor car, from some cause not shown by the testimony, and despite his efforts to bring it to a stop the train of three cars continued to run rapidly down grade toward other cars standing on the track at the foot of the grade with which they were certain to collide. Plaintiff in the meantime having gone to the rear platform either jumped from the car or was thrown from it by its swaying and lurching, receiving the injury for which this action was brought to recover compensation. The court below entered a compulsory nonsuit on the ground that plaintiff failed to show negligence on the part of defendant and especially the degree of negligence necessary to make defendant liable under the circumstances of the case, which it subsequently refused to take off. Plaintiff appealed.

Plaintiff was not a passenger on the car and did not enter it for the purpose of being transported. His presence there was merely for his personal convenience and comfort while eating lunch. Under these circumstances he was at most a mere licensee and consequently cannot claim to be entitled to the degree of care a carrier of passengers owes to those whom it undertakes to transport. The car in question was neither intended nor used for conveying passengers. It was what is known as a work car and used only for transporting material and employees engaged in repairing tracks. The case is distinguished from the authorities relied on by plaintiff which hold a carrier undertakes to safely transport all persons lawfully using its means of transportation, even though the service be gratuitously rendered. Under the circumstances of this case the presumption of negligence

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arising where a passenger is injured in the course of transportation does not apply. As a licensee riding on a work train defendant owed him no duty except to refrain from injuring him by intentional, wanton or wilful acts: *Ortlieb v. Poth*, 249 Pa. 270; *Schiffer v. Sauer*, 238 Pa. 550.

Furthermore, plaintiff's employment by the city did not require him to ride on defendant's work car and we find nothing in the record indicating the foreman's authority to transport plaintiff or invite him to enter the car for that purpose. Consequently, no duty arose to carry him safely nor is there liability on defendant for injury to him, unless such injury was the result of wilful, wanton or intentional acts (*Hughes v. Murdock S. & T. Co.*, 269 Pa. 222), and we find no evidence of the existence of such acts. In view of the conclusion reached above we deem consideration of the other questions argued on this appeal unnecessary.

The judgment is affirmed

Christian Moerlein Brewing Co. v. Rusch, Appellant.

Trusts and trustees—Principal and agent—Agent taking property in his own name—Right to damages for injury to property by change of grade—Parol promise—Act of April 22, 1856, P. L. 532—Evidence—Memorandum in writing—Witness—Failure to object to evidence at trial—Waiver—Appeals.

1. The property of a principal does not necessarily become that of the agent, because the latter is authorized to and does receive it in his own name.

2. It is competent to show a writing was executed on the faith of a parol promise, although the latter may change the terms of the former.

3. A trust as to personal property may always be established by parol.

4. In an action to recover money received by defendant as change of grade damages to a leasehold standing in his name, where plain-

tiff claims that the leasehold was held in trust for them, judgment for plaintiff will be affirmed, where letters of defendant clearly admitted the existence of the trust, and the evidence shows that the damages had been formally assigned to defendant without consideration, in order to assist in their collection.

5. In such case, as plaintiff was not trying to enforce a trust as to realty, the five years' limitation provided by section 6 of the Act of April 22, 1856, P. L. 533, has no application.

6. Nor is it necessary, under the circumstances of the case, to decide whether a leasehold estate falls within the term of "lands, tenements or hereditaments" in section 4 of the Act of 1856, for, if so, the trust was sufficiently manifested or acknowledged in writing signed by defendant to satisfy the statute.

7. Where a witness has no present recollection of a past event, even when aided by a memorandum made at the time, the memorandum itself may be offered in evidence, on proof by the witness of his knowledge of its accuracy when made, and that it was made when the transaction was fresh in his mind.

8. The place to question the authenticity of written evidence, is in the trial court, where it can be met, and not on appeal.

Argued October 12, 1921. Appeal, No. 129, Oct. T., 1921, by defendant, from judgment of C. P. Allegheny Co., April T., 1920, No. 2054, on verdict for plaintiff, in case of Christian Moerlein Brewing Co. v. Ernest F. Rusch. Before MOSCHZISKE, C. J., WALLING, KEPHART, SADLER and SCHAFFER, JJ. Affirmed.

Assumpsit for money had and received. Before CARNAHAN, J.

The opinion of the Supreme Court states the facts.

Verdict and judgment for plaintiff for \$63,431.64. Defendant appealed.

Error assigned, inter alia, was refusal of judgment for defendant, n. o. v.

Nelson McVicar, of McVicar, Hazlett, Gardner & Gannon, for appellant.—The defendant was entitled to the damages resulting from the grading of Second Avenue by virtue of the title which the plaintiff, itself, conceded

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was in the defendant: *McMillin Printing Co. v. R. R. Co.*, 216 Pa. 504; *Consolidated Ice Co. v. R. R. Co.*, 224 Pa. 487.

A trust of leasehold or other chattels real is within the statute, and must be proved by writing as in case of real estate.

The evidence of a trust was insufficient in quantity and quality for submission to the jury: *Ralston v. Traction Co.*, 267 Pa. 257; *Beckett v. Allison*, 188 Pa. 279.

The memorandum of the witness was not admissible: *Heart v. Hummel*, 3 Pa. 414; *Dodge v. Bache*, 57 Pa. 421; *Juniata Bank v. Brown*, 5 S. & R. 226; *Smith v. Lane et al.*, 12 S. & R. 80; *Hottle v. Weaver*, 206 Pa. 87.

John G. Frazer, with him *Reed, Smith, Shaw & Beal*, for appellee.—The award of the viewers in the name of *E. F. Rusch* is not conclusive as against plaintiff.

The trust was not void or unenforceable under the statute of frauds: *Brown v. Beecher*, 120 Pa. 590; *Titusville Iron Works' App.*, 77 Pa. 103; *Kile v. Giebner*, 114 Pa. 381.

The trust with respect to the lease may well be considered a resulting trust, and such as is not subject to provisions of the statute: *Hayes's App.*, 123 Pa. 110; *Maffitt v. Rynd*, 69 Pa. 380; *Hess's App.*, 112 Pa. 168; *Hollis v. Hollis*, 254 Pa. 90; *Simonds's Est.*, 201 Pa. 413; *Davidson v. Davidson*, 262 Pa. 520.

The assignment of damages by *John Moerlein* to *Rusch* did not prohibit plaintiff from recovering these damages from *Rusch*: *Excelsior S. F. & L. Assn. v. Fox*, 253 Pa. 257.

The plaintiff's evidence as to the existence of a trust was sufficient to submit to the jury.

Greenfelder's reports were admissible in evidence: *Brown v. Com.*, 73 Pa. 321; *P. & R. R. v. Spearen*, 47 Pa. 300; *Rothrock v. Gallaher*, 91 Pa. 108.

OPINION BY MR. JUSTICE WALLING, January 3, 1922:

The plaintiff brewing company is located at Cincinnati and, in 1890, Joseph Bruening, the distributor of its beer in Pittsburgh, leased of Mary E. Schenley a lot at the corner of Second Avenue and Try Street, in the latter city, for the term of seven years, with the right to remove improvements erected thereon. Bruening erected certain buildings on the lot, which, with an assignment of the lease, he transferred to Christian Moerlein, of the plaintiff company, in 1893 for \$17,000. In 1895 Ernest F. Rusch, the defendant, took Bruening's place as the exclusive distributor of plaintiff's beer in Pittsburgh and vicinity, and to him Moerlein made a sublease of the premises. At the expiration of the seven-year lease, Mrs. Schenley made a new lease to Rusch, for the same lot for a term of twenty and one-fourth years, which, in 1898, he, with Mrs. Schenley's approval, assigned to John Moerlein, who held it in trust for the brewing company. That year (1898) plaintiff expended over \$33,000 in the erection of new buildings upon the lot, and in 1907 the further sum of \$11,000. The lease stood in the name of John Moerlein until 1911 and meantime the premises were occupied by Rusch, who was licensed as a wholesale liquor dealer, but his sales were confined exclusively to beer bought of plaintiff. The arrangement was apparently beneficial to both parties; it made a market for plaintiff's product and defendant realized the profit on a large sale. So, while plaintiff furnished the place, defendant paid the ground rent, taxes, etc., incident to the leasehold estate. However, in 1906, viewers of a street improvement made a benefit assessment of \$12,300 against this leasehold estate. In this proceeding Rusch was named as owner and took an appeal; but some years later a compromise verdict was taken in favor of the city for \$9,000, which was paid by plaintiff through defendant and at his request. Before this compromise, defendant's attorney wrote plaintiff's agent requesting a reassignment of the lease to Rusch as

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a probable help in the trial of that case and also in the renewals of the liquor license, and requested that such reassignment be post-dated. Pursuant to this letter, John Moerlein, on February 3, 1911, assigned the lease back to Rusch, and dated the same December 4, 1899. There was no consideration for the assignment to or from Moerlein.

About 1910 it became known that the city would so lower the grade of the street in front of this lot as to render the buildings thereon inaccessible and unfit for defendant's use. In view of that, plaintiff purchased another lot in Pittsburgh on which it erected very expensive buildings, to which defendant removed his business. In 1912 the city proceeded with the change of grade of the street in front of the Schenley lot, and the question of damages to the leasehold interest, standing in the name of Rusch, became vital. At the request of his attorneys, and to remove any question as to the proper claimant, John Moerlein, in 1913, duly assigned to Rusch all damages sustained by such change of grade. Thereafter, on December 2, 1915, the city paid Rusch \$49,932.89, which included interest to that date, being the amount of the damages caused to the leasehold estate as adjusted. This suit was brought to recover from Rusch the sum last above mentioned, with interest, on the averment that, while the leasehold stood in his name, he was in fact the trustee thereof for plaintiff; this he denied and the case went to jury trial. Plaintiff offered a large amount of evidence tending to establish the trust, including oral and written admissions of the defendant, who also submitted evidence in support of his denial. The trial judge charged the jury the burden was on plaintiff to establish the trust by evidence clear, precise and indubitable. The verdict was for plaintiff for the full amount of the claim, and from judgment entered thereon defendant brought this appeal.

A careful examination of the entire record discloses no reversible error. The proofs fully justify the finding

of a trust, especially defendant's written admissions. For example, his letter to plaintiff of July 20, 1911 (after the lease had been reassigned to him), referring to a proposed sale of the unexpired term of the leasehold, contains a distinct admission of plaintiff's ownership and defendant's agency. Again, his letter to plaintiff of June 19, 1912, says, "As to the damages done your Second Avenue property want to say that you won't hear from this until all improvements have been made, and the awards made by the board of viewers, which will consume a year or more from this date." John Moerlein's formal assignment of the damages caused by change of grade was made to Rusch without consideration and at the written request of his attorneys so as to remove any doubt of his right to receive the damages (the transfer of the lease back to Rusch not then having been approved by the Schenley estate) and is not conclusive against the existence of a trust. The property of the principal does not necessarily become that of the agent because the latter is authorized to and does receive it in his own name. The evidence is defendant repeatedly acknowledged plaintiff's right to the damages in question after the assignment and even after he had received the money, and that for some time he concealed the latter fact from plaintiff.

It is competent to show a writing was executed on the faith of a parol promise, although the latter may change the terms of the former: *Excelsior Sav. F. & L. Assn. v. Fox*, 253 Pa. 257; *Gandy v. Weckerly*, 220 Pa. 285.

It is not necessary here to decide whether a leasehold estate is such "lands, tenements or hereditaments" as falls within section 4 of the Act of April 22, 1856, P. L. 532, for, if so, the trust is sufficiently manifested or acknowledged in writing signed by defendant to satisfy the statute. The locus in quo is admitted and described in the affidavit of defense and attached exhibit, while the trust is manifested by defendant's letters. Aside from this, plaintiff's suit is for personal property, to wit:

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money, a trust as to which may always be established by parol: *Simond's Est.*, 201 Pa. 413, 417; *Hess's App.*, 112 Pa. 168; *Maffitt's Administrator v. Rynd*, 69 Pa. 380; *Washington's Est.*, 220 Pa. 204.

As plaintiff is not trying to enforce a trust as to realty, the five-year limitation contained in section 6 of said act does not apply. In fact the damages for injury to the leasehold were received within less than five years after the lease was assigned to defendant and this suit was brought within less than five years after the damages were so received; of course plaintiff's right to sue for the money did not accrue prior thereto. Whether it was a resulting trust, or a trust so far executed as to take it out of the statute of frauds, we need not determine.

J. Greenfelder, as plaintiff's agent, had numerous conversations with defendant concerning questions pertinent to this suit. While the matter was fresh in his mind, Greenfelder put the conversations in writing in the form of reports to plaintiff. At the trial, Greenfelder was examined as a witness, but could not recall the substance of the conversations, even with the aid of the reports. He, however, identified the reports and testified, in a general way, as to his knowledge of their accuracy when made. The admission of the reports, over defendant's objection, constitutes the fifth assignment of error. The question was rightly ruled. Where a witness has a present recollection of a past event, although his memory is refreshed by a memorandum made at the time of the event, he testifies from such recollection; but where he has no present recollection of such past event, even when aided by his memorandum, the latter itself may be offered in evidence, on proof by the witness of his knowledge of its accuracy when made and that it was made when the transaction was fresh in his mind. This is in terms past the recollection of the witness and is admissible in evidence under the great weight of authority.

In *Heart v. Hummel*, 3 Pa. 414, 415, Chief Justice GIBSON, speaking for the court, says, "It is fallacious to suppose that the law prefers memory to writing for the preservation of evidence; or that a memorandum which fails to move the memory of him who made it, cannot be introduced as independent proof, preceded by his oath, of its accuracy when it was written." In 10 R. C. L., p. 1145, section 350, following a discussion of the subject, it is stated, "that if a memorandum of the details of a transaction relevant to the issue is shown by testimony to be the original unaltered paper, and to have been correct when written, such paper is, in connection with such testimony, admissible as competent documentary evidence, though the witnesses have no recollection, either before or after examining the paper, of its details. The notation or memorandum is competent as evidence of the past recollection of the witness." The same rule is stated and illustrated in a comprehensive discussion in *Wigmore on Evidence*, vol. 1, beginning on page 836; see also 40 Cyc. 2467. Under a like principle a lawyer's notes of the testimony of a witness taken on a former trial are competent evidence: *Rhine v. Robinson*, 27 Pa. 30; *P. & R. R. Co. v. Spearen*, 47 Pa. 300; *Chess v. Chess*, 17 S. & R. 409. See also *Dodge v. Bache*, 57 Pa. 421; *Phila. Housewrecking Co. v. Nolen*, 252 Pa. 443.

We have referred to a letter from defendant's attorney requesting a reassignment of the lease to Rusch, and error is assigned to its admission because neither his signature nor his authority was proven. Error is also assigned to the admission of defendant's letter to plaintiff of July 19, 1911, for lack of proof of the signature, which was typewritten. No such objection was made to either letter in the court below and therefore cannot be considered here: *Benner v. Fire Assn. of Phila.*, 229 Pa. 75; 3 *Corpus Juris*, p. 818. The place to question the authenticity of written evidence is in the trial court, where it can be met.

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The affidavit of defense, in the nature of a demurrer, to plaintiff's statement, was properly overruled, as the latter makes out a prima facie case.

The assignments of error are overruled and the judgment is affirmed.

Commonwealth ex rel. v. Dale Borough, Appellant.

Constitutional law—Title of act—Amending Act—Acts of June 27, 1913, and July 6, 1917—Municipalities—Boroughs—Annexation—Cities of the third class.

1. If the title of an act does not fairly give notice of the contemplated legislation, so as to reasonably lead to inquiry as to what is contained in the body of the bill, section 3, of article III, of the Constitution is violated, and the legislation in regard to it must fall.

2. Where the title of an amending act quotes the title of the act to be amended, the courts, in considering the sufficiency of the title of the supplementary act, must treat the part quoted as a part of the title of the later act.

3. The title of the Act of July 6, 1917, P. L. 751, which amended section 1, article III, of the Third Class City Act of June 27, 1913, P. L. 568, is insufficient, because it fails to give notice of the provision requiring a borough council to pass an appropriate ordinance asking annexation when three-fifths of the taxable inhabitants so request. The amending act is therefore unconstitutional.

4. The act attempts, not to regulate what the cities of the third class may do in the matter of increase of limits, but to impose an entirely new obligation upon municipalities of an entirely different class, such as boroughs.

Argued September 27, 1921. Appeal, No. 72, Oct. T., 1921, by defendant, from order of C. P. Cambria Co., Dec. T., 1919, No. 6, awarding peremptory mandamus, in case of Commonwealth ex rel. D. P. Weimer, District Attorney, v. Burgess and Town Council of the Borough of Dale. Before MOSCHZISKE, C. J., FRAZER, WALLING, SIMPSON, KEPHAET, SADLER and SCHAFER, JJ. Reversed.

Statement of Facts—Opinion of the Court. [272 Pa. Petition for mandamus. Before STEPHENS, P. J. The opinion of the Supreme Court states the facts. Mandamus awarded. Defendant appealed.

Error assigned, inter alia, was order, quoting it.

D. P. Weimer, with him *George C. Keim* and *W. A. McGuire*, for appellants.—If by its title an act appears to affect only the residents of a certain locality, while in the body of the bill there are provisions affecting other territory, it has been held that the title is misleading and the act unconstitutional: *Payne v. School Dist.*, 168 Pa. 386, 391; *Phila. v. Ry. Co.*, 142 Pa. 484; *Quinn v. Cumberland Co.*, 162 Pa. 55; *Ridge Ave. Pass. Ry. Co. v. Phila.*, 124 Pa. 219; *Co. Com'r's Petition*, 255 Pa. 88; *Fedorowicz v. Brobst*, 254 Pa. 338.

Lee C. Beatty, with him *Howard W. Stull*, for appellees, cited: *Lackawanna Twp.*, 160 Pa. 494; *Morrellville Boro. Annexation*, 7 Pa. Superior Ct. 532; *Pottstown Boro.*, 117 Pa. 538; *Sugar Notch Boro.*, 192 Pa. 349; *Allentown v. Wagner*, 214 Pa. 210.

OPINION BY MR. JUSTICE SADLER, January 3, 1922:

The Borough of Dale adjoins the City of Johnstown, and certain of its citizens desired that it be annexed thereto. A petition, purporting to be signed by three-fifths of the taxable inhabitants, was presented to the town council, requesting that appropriate municipal action be taken to effect this end. After investigation, the borough authorities determined that the requisite number of signers, as fixed by the Act of July 6, 1917, P. L. 751, had failed to join. Further, the existence of any valid legislation requiring the passage of an ordinance, such as asked for, without approval by council of the action proposed, was challenged. It therefore refused to act affirmatively upon the application. The court of common pleas subsequently issued a writ of

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peremptory mandamus, and, from the judgment entered, this appeal is taken.

It is contended, first, that the act of assembly, upon which the proceeding rests, is void in that the legislation is violative of article III, section 3, of the Constitution. This makes necessary a consideration of the applicable statutes. The Act of July 6, 1917, P. L. 751, is called an amendment to section 1 of article III of the Third Class City Act of 1913, and recites the title of the earlier law. That enactment (June 27, 1913, P. L. 568), made provision, as expressed in its title, "for the incorporation, regulation and government of cities of the third class; regulating the nomination and election of municipal officers therein; and repealing, consolidating and extending existing laws in relation thereto." In considering the sufficiency of the title to the supplementary act, what has been quoted must be treated as a part thereof, and if the provisions found in the amendment are germane to the subject of the original, it must be upheld: Pottstown Borough, 117 Pa. 538.

"While we have repeatedly said that the title to an act of assembly need not be a complete index to its contents embodying all the distinct provisions of the bill, we have as often declared that if it does not fairly give notice of the contemplated legislation, so as to reasonably lead to inquiry as to what is contained in the body of the bill, the 3d section of the 3d article of the Constitution is violated, and the legislation in disregard of it must fall. The purpose of this constitutional provision is to give information to the members of the legislature, or others interested, by the title of the bill, of the contemplated legislation, and thereby to prevent the passage of unknown and alien subjects which may be coiled up in its fold": *Fedorowicz v. Brobst*, 254 Pa. 338, 341. The prohibition applies only, however, to direct legislation, and not to the incidental operation of statutes, valid in themselves, upon subjects other than those with which they expressly deal: *Sugar Notch*

Borough, 192 Pa. 349; Allentown v. Wagner, 214 Pa. 210.

The title to the Act of 1913, repeated in and to be read with that of the Supplement of 1917, is broad and comprehensive, indicating clearly an intention to regulate the affairs of cities of the third class. In this respect it is like the earlier law of 1889 (May 23, P. L. 227), and is couched in general terms, similar to those used in the enactments fixing the powers of municipalities of the various classes. By its 3d article, provision was made for annexation of an adjacent borough, upon its application, and for the addition of other lands adjoining, after action by the grand jury, predicated upon the preliminary consent of the city. In both instances, the admission depends upon the approval of the municipal authorities, and doubtless the title to the Act of 1913 is sufficiently full to justify appropriate action by the city, as provided therein. Harris's Appeal, 160 Pa. 484 (based on the Act of 1889), and Pottstown Borough, 117 Pa. 538 (based on the Borough Act of 1851), cases relied upon by the learned court below, support this proposition, but do not control the present contention.

A different situation arises in dealing with the Act of 1917. It attempts, not to regulate what the cities of the third class may do in the matter of increase of limits, but imposes an entirely new obligation upon an independent municipality, in requiring the borough council to pass an appropriate ordinance asking annexation when three-fifths of its taxable inhabitants so request. A reading of the title, in connection with that of 1913, expressly defined to be applicable only to third class cities, would indicate no such legislative purposes. Such mandatory action by the council of an adjoining borough is more than an incident to the operation of the earlier statute. The placing of new burdens and imperative duties upon it finds no suggestion in the title, and, under such circumstances, statutes have always met with condemnation when brought to our attention: Quinn v.

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Cumberland County, 162 Pa. 55; Payne v. School District, 168 Pa. 386; Mt. Joy Boro. v. Lancaster Turnpike, 182 Pa. 581; Daily v. Potter County, 203 Pa. 595; County Commissioners' Petition, 255 Pa. 88; Wright v. Luzerne County, 67 Pa. Superior Ct. 618. We see no reason for departing from this rule in the present case, and conclude, therefore, that the Act of July 6, 1917, is void and unenforceable.

Another question, raised on this appeal, becomes unimportant in view of the conclusion reached. It was insisted that an improper method was adopted in determining who were "taxable inhabitants," entitled to become petitioners for annexation. A discussion of the rulings made by the court below is now unnecessary, but the failure to comment upon the objections made is not to be understood as indicating an approval of the principles applied.

The decree of the court below is reversed, and it is ordered that the petition be dismissed at the cost of the appellee.

Danziger, Appellant, v. Ferber.

Master and servant — Wages — Attachment — Act of April 15, 1845, P. L. 459 — Salary — Accumulations — Bonus.

1. The protection afforded by the Act of April 18, 1845, P. L. 460, is not lost because wages were not paid by an employer when due, but were permitted to accumulate in his hands.

2. Wages which are prevented from being paid over to an employee, by reason of service of an attachment, are exempt.

3. Where an employee was to receive a bonus in addition to wages, conditioned upon his being alive at the time of the termination of the current term of the agreement of employment, such bonus could not be attached until the term was ended, even if otherwise attachable.

4. The terms wages and salary, exempt from attachment, include all money paid for personal services, whether in the form of regular payments or in the form of bonus or commissions, where there is no element of direct profit on the labor of others.

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Argued October 11, 1921. Appeal, No. 81, Oct. T., 1921, by plaintiff, from order of C. P. Allegheny Co., July T., 1920, No. 2393, making absolute rule to dissolve attachment, in case of Ed. Danziger v. Louis Ferber. Before MOSCHZISKER, C. J., FRAZER, WALLING, KEPHART, SADLER and SCHAFER, JJ. Affirmed.

Rule to dissolve attachment. Before HAYMAKER and KLINE, JJ.

The opinion of the Supreme Court states the facts.

Rule absolute. Plaintiff appealed.

Error assigned was order, quoting it.

Robbin B. Wolf, of *McCreery & Wolf*, for appellant.—The order of the court below gave to the Act of 1845 an interpretation broader than the facts warranted. The act is class legislation, to be strictly construed and it must not be construed so as to permit the employer to serve as banker for his employee and thus, consciously or unconsciously, to defeat the ends of justice.

The bonus in the case at bar is neither salary nor wages so as to come within the exemption: *O'Neill v. Beasley*, 17 Pa. Dist. R. 153; *Smith v. Brooke*, 49 Pa. 147.

Harry Weisberger, with him *Meredith R. Marshall* and *Rody P. Marshall*, for appellee.—The money due defendant from his employer, the garnishee, being due him as wages or salary, for personal services rendered, is not attachable: *Hamberger v. Marcus*, 157 Pa. 133; *Watson v. Christ*, 62 Pa. Superior Ct. 604; *Penna. Coal Co. v. Costello*, 33 Pa. 241; *Hartman v. Mitzel*, 8 Pa. Superior Ct. 22.

OPINION BY MR. JUSTICE FRAZER, January 3, 1922:

Plaintiff obtained judgment against defendant under which he attached funds in the hands of defendant's em-

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ployer, the owner of a large department store in the City of Pittsburgh. The latter admitted a stated amount due as installments of salary, also an amount to become due as a bonus. The court below, after argument, dissolved the attachment, and plaintiff appealed.

Plaintiff does not seriously contend that the salary as such was not exempt from attachment under the Act of April 15, 1845, P. L. 459, arguing, however, that the protection of the act was lost because the wages were not paid when due but were permitted to accumulate in the hands of the employer. This contention cannot be sustained. The contract of employment provided defendant should give his services exclusively to his employer, begin work August 1, 1918, and receive an annual salary of \$7,500, to be paid in equal monthly installments of \$625, beginning September 1, 1918. Payment was thus made on the first day of each month for services rendered during the preceding month. The attachment was served on the employer the last day of June, 1920. On that date defendant had earned his salary for the month of June and the sum of \$625 would, in the usual course, have been paid him the next day, had the attachment not been served. Answers to the interrogatories were filed July 30, 1920, in which it was stated, *inter alia*, that, at the time of the service of the writ, there was due defendant by the garnishee the sum of \$625 as salary, and since the service of the writ defendant "has earned an additional month's salary." Apparently this refers to the salary earned during the months of June and July. If so, there is no foundation for the contention that the money was permitted to accumulate in the hands of the employer after becoming due. Payment of the amounts when due was prevented by the attachment. If, however, we construe the answer as referring to the installments due for the months of May and June there is nothing in the Act of 1845, nor in the facts of this case, warranting us in depriving defendant of the benefit of its provisions,

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merely because of payment being thirty days overdue at the time the attachment was served.

With respect to the item of bonus the contract contains a clause which provides that if the employee should perform all the covenants and duties required of him under his contract of employment and if the total net sales in the department under his charge for the fiscal year, ending February 1, 1920, yield a stated gross profit and the inventory of stock on hand in that department did not exceed a certain percentage of the sales for the preceding year, then defendant should receive a bonus of a fixed percentage based on excess sales. There was also a further provision that the death of the employee "prior to the termination of this agreement shall terminate this agreement and in such case the monthly installment of salary received prior thereto.....shall be considered payment in full of all claims.....under this agreement." From the foregoing it follows that the bonus was not, in fact, due and payable absolutely at the time the writ was served, but was conditional upon the employee being alive at the time of the termination of the current term of the agreement, which was apparently February 1, 1921.

The remaining question requiring consideration is whether the bonus should be treated as wages and exempt as such under the Act of 1845. This question has already been decided in the affirmative by earlier decisions of this court. The terms "wages" and "salary," under the Act of 1845, have been construed to include all money paid for personal services, whether in the form of regular payments, or in the form of commissions, or in some other manner which makes the amount and time of payment depend upon the extent of services rendered the employer. "All laborers employed by the persons or companies referred to in the act are entitled to its benefits, whether the wages agreed to be paid them are measured by time, or by the ton, or by the piece, or any other standard": Seider's App., 46 Pa. 57. In Ham-

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berger v. Marcus, 157 Pa. 133, 137, this court said: "It is what the employer owes, his employee, for personal services rendered in that relation, which is exempt from attachment in the hands of the employer, and it matters not whether it is called wages or salary." The latter case held commissions paid a traveling salesman were exempt. In *Watson Co. v. Christ*, 62 Pa. Superior Ct. 604, compensation based on a percentage of the payroll of employees was held within the protection of the statute. In the present case we find no element of direct profit on the labor of others, as in *Smith v. Brooke*, 49 Pa. 147, cited by appellant. In that case a mechanic employed laborers and received from his employer for their services more than he actually paid them. Here defendant was merely manager of a department of his employer's mercantile business; did not hire others on his own account and received no part of the wages paid them. The bonus was clearly part of his compensation for services as such manager, and within the terms of the act.

The judgment is affirmed.

Grundler et al. v. Chmielinska, Appellant.

Wills—Construction—Devise — Fee simple estate — Life estate with power of alienation.

Where testator devises his real estate to his two daughters naming them, the survivor to take the entire estate if one shall precede the other in death, and then directs that, after the death of both daughters, the real estate, "if still owned by either of them," shall go to his three sons, the daughters have a right to sell the real estate and convey a good and marketable title to it; and this is the case whether they take a fee or a life estate with power of alienation.

Submitted October 12, 1921. Appeal, No. 156, Oct. T., 1921, by defendant, from judgment of C. P. Allegheny

198 GRUNDLER et al. v. CHMIELINSKA, Appellant.

Statement of Facts—Opinion of the Court. [272 Pa. Co., July T., 1921, No. 1987, for plaintiffs on case stated, in suit of Caroline Grundler and Mary Fridl v. Mary Chmielinska. Before MOSCHZISKE, C. J., FRAZER, WALLING, KEPHART, SADLER and SCHAFER, JJ. Affirmed.

Case-stated to determine marketability of real estate. Before CARPENTER, J.

The opinion of the Supreme Court states the facts. Judgment for plaintiffs. Defendant appealed.

Error assigned, inter alia, was judgment, quoting it.

Earl F. Reed and *W. S. Doty*, for appellant.

Simon Sher, for appellees.

PER CURIAM, January 3, 1922:

We affirm this judgment on the following excerpts from the opinion of the court below: "Barbara Grundler, being seized in fee of certain real estate in the City of Pittsburgh, died testate, January 30, 1917; by her will, since duly probated, she directed, inter alia, 'I give, devise and bequeath unto my daughters, Caroline Grundler and Mary Fridl, or their respective heirs and assigns forever, share and share alike, my real estate, and should one of my said daughters precede the other in death, then the surviving daughter shall receive the entire real estate. After the death of both of my said daughters, the real estate, if still owned by either of them, I give, devise and bequeath the same unto my three sons, Joseph Grundler, Frank Grundler and Wenzel Grundler or their respective heirs and assigns forever, share and share alike.' Caroline [unmarried] and Mary (the husband of the latter joining) entered into an agreement to sell and convey, in fee, the real estate mentioned, and subsequently tendered a deed to the purchaser, who refuses to comply with her contract, al-

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leging that the grantors cannot convey 'a good and marketable title.' The only contingency on which depends the right of the sons to take cannot happen if the contract involved is carried into effect by conveying the land. It is immaterial whether the daughters [plaintiffs] took a fee or a life estate with power of alienation, the purchaser will take a fee: see *Edwards et al. v. Newland*, 271 Pa. 1."

The will here in question clearly confers the right of alienation on the daughters; and this is enough to sustain the disposition of the case made by the court below.

Judgment affirmed

Abersold v. Marcus et al., Appellants.

Libel—Ambiguous expressions—Case for jury.

1. Where words of an alleged libel are ambiguous, and reasonably capable of two meanings, one of which is actionable, and the other innocent, it is for the jury to say in which sense the words were uttered or understood.

2. The following language is ambiguous and the case accordingly for the jury: "He [plaintiff], while acting as our [defendants'] agent, collected money for our house and solicited business for us, which he turned over to one of our competitors."

Argued October 13, 1921. Appeal, No. 119, Oct. T., 1921, by defendants, from judgment of C. P. Allegheny Co., Oct. T., 1920, No. 811, on verdict for plaintiff, in case of *Charles E. Abersold v. J. Marcus and B. Marcus, et al.* Before MOSCHZISKE, C. J., FRAZER, WALLING, SADLER and SCHAFER, JJ. Reversed.

Trespass for libel. Before EVANS, J.

The opinion of the Supreme Court states the facts.

Verdict for plaintiff for \$3,000 on which judgment was entered for \$2,000. Defendants appealed.

Assignment of Errors—Opinion of the Court. [272 Pa.

Errors assigned, inter alia, were instructions recited in opinion of Supreme Court, quoting record.

Charles H. Sachs, of *Sachs & Caplan*, with him *J. J. Goldsmith*, for appellant.—The case was for the jury: *Pfeifly v. Henry*, 269 Pa. 533; *Mengel v. Reading Eagle Co.*, 241 Pa. 367; *Stoner v. Erisman*, 206 Pa. 600.

W. Heber Dithrich, with him *H. Fred Mercer*, for appellee, cited: *Wood v. Boyle*, 177 Pa. 620; *Collins v. Pub. Co.*, 152 Pa. 187; *Price v. Conway*, 134 Pa. 340; *McIntyre v. Weinert*, 195 Pa. 52; *Holland v. Flick*, 212 Pa. 201.

OPINION BY MR. JUSTICE SCHAFFER, January 3, 1922:

This is an action of libel; plaintiff recovered a substantial verdict, which the court below reduced; judgment was then entered thereon, and defendant has appealed, complaining of instructions given by the trial judge to the jury.

The alleged libel was contained in a letter, written by defendants to some of their customers, reflecting on plaintiff, who had been in their employ as salesman.

The material part of the communication reads: "He [plaintiff], while acting as our agent, collected money for our house and solicited business for us, which he turned over to one of our competitors." The court, in its charge, said to the jury: "It charges the plaintiff with having collected money and turned it over to competitors of the defendants, and having solicited business for the defendants and then turned that over to the defendants' competitors. . . . There is no attempt to justify the statement in this letter that the plaintiff has collected money for the defendant firm and turned it over to their competitors. . . . As I stated to you, the charge that he had collected money is a libelous charge, and as there is no attempt to justify it in this case, I charge you as

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matter of law that so far as that communication is concerned this letter is a libel."

Defendants contend the court gave a wrong construction to the writing; that the meaning is not such as the court assigned to it; that at least the meaning is ambiguous and, this being so, it was not for the court, but for the jury, to construe the language and determine what it means.

It will be noted the words do not charge the plaintiff with appropriating defendants' money to his own use; given the strongest construction against defendants which can be ascribed to them, they charge that he did the very unusual, indeed well nigh unheard of thing of collecting their money and turning it over to their competitors; but, defendants say, this is not the meaning to be taken from the language used at all; "which he turned over to one of our competitors," they argue, refers to the business which he solicited, not the money he collected, or, if this be not the true meaning, and if the statement as to the money and the soliciting of business are to be taken together, then it is, that, while collecting money for defendants, as their agent, he solicited business in their name, which he turned over to one of their competitors. Defendants,—asserting the language is ambiguous and of doubtful import,—urge that its meaning was for the jury, not the court.

We are constrained to the conclusion that the language is of doubtful meaning; it is not such as where "Standing alone the common understanding of mankind takes hold of the published words, and at once, without difficulty or doubt, applies a libelous meaning to them"; it is only when this is the case that "they are to be so construed as a matter of law": *Mengel v. Reading Eagle*, 241 Pa. 367, 370. Long ago we said: "It is the province of the jury, and not of the court, to construe words of dubious import": Per GIBSON, C. J., in *Hays v. Brierly*, 4 Watts 392. "Where the words used are ambiguous in their import, or may permit,—in their construction, con-

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nection or application,—a doubtful, or more than one, interpretation, and in some sense be defamatory, the question whether they are such is for the jury under proper instructions from the court”: 17 Ruling Case Law, title Libel and Slander, section 184. “It is true, the question, as to the sense in which the words are used, is generally for the jury, but that question like all others which fall within the cognizance of a jury, is one of fact and must be determined upon proper proof; if words are reasonably capable of two meanings, one of which is actionable and the other innocent, it is for the jury to say in which sense the words were uttered or understood”: Pittsburgh, Allegheny & Manchester Passenger Ry. Co. v. McCurdy, 114 Pa. 554, 558. The Supreme Court of the United States, in Baker v. Warner, 231 U. S. 588, 594, thus stated the principle: “It was for the jury and not for the court to determine the meaning of ambiguous language in the published article. Where words are libelous per se the judge can so instruct the jury, leaving to them only the determination of the amount of damages. . . . The meaning of the words was in dispute, and as that issue of fact was not submitted to the triers of fact, a new trial must be ordered.”

We are not to be understood as saying that the jury, under proper instructions, may not interpret the letter as the court in its charge did; all we decide is that the meaning of the words, because of their ambiguity, is for the jury, not the court.

The assignments of error are sustained and judgment is reversed with a new venire.

Stybr, Appellant, v. Walter.

Promissory notes—Payment—Contract—Evidence—Prejudicial use of evidence—Cross-examination.

1. In an action on promissory notes given for the benefit of a corporation to whom plaintiff had made advances before the giving

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of the notes, it is reversible error to admit in evidence an agreement in writing between the parties to the notes, relating to a prior loan, in which the notes were not mentioned and which had no connection with them, and to permit the use of the agreement in such a way as to prejudice the rights of plaintiff.

2. Cross-examination cannot be used so as to get before the jury incompetent and prejudicial facts not referred to in the direct examination.

3. Where on appeal from judgment on verdict for defendant, the record shows that counsel for defendant set out to confuse, rather than to enlighten, the court and jury, and to prejudice the latter against plaintiff and his counsel, the verdict so won, will have little chance of standing on appeal, when any specific error appears on record which can fairly be accounted reversible.

4. Where an oral agreement is set up as a defense in an action on promissory notes, counsel for defendant should endeavor to get his witnesses to state facts from which the jury may draw conclusions, rather than merely their own conclusions as to what occurred when the alleged oral agreement was made.

Argued October 13, 1921. Appeals, Nos. 123, 124 and 125, Oct. T., 1921, by plaintiff, from judgment of C. P. Allegheny Co., Jan. T., 1919, Nos. 1740, 1777 and 1778, on verdicts for defendants, in cases of J. Stybr v. Peter G. Walter, J. Stybr v. M. N. Greer et al. and J. Stybr v. M. N. Greer et al. Before MOSCHZISKER, C. J., FRAZER, WALLING, SADLER and SCHAFFER, JJ. Reversed.

Assumpsit on promissory notes. Before MACFARLANE, J.

The opinion of the Supreme Court states the facts.

Verdict and judgment for defendants. Plaintiff appealed.

Errors assigned were various rulings and instructions, sufficiently appearing by the opinion of the Supreme Court, quoting record.

L. S. Levin, for appellant, cited: *Mudoch v. Biery*, 269 Pa. 577; *Colonial Trust Co. v. Getz*, 28 Pa. Superior Ct. 619; *Lesley v. Ewing*, 244 Pa. 480; *Kane v. Transit Co.*, 248 Pa. 160.

Meredith R. Marshall, with him *Rody P. Marshall*, for appellees.

OPINION BY MR. CHIEF JUSTICE MOSCHZISKE, January 3, 1922:

This and two other like actions were tried together in the court below and argued as one case here, the facts in each being substantially the same. All three cases arise out of claims by plaintiff against defendants, individually and collectively, on a series of notes amounting to \$19,000, given by the latter to secure the former for advances made by him to a corporation in which all parties concerned were stockholders. After plaintiff had advanced considerable sums to the corporation in question, and when further funds were required for the purpose of its business, he insisted that defendants give him the notes in suit, as additional security, before putting out any more money. The corporation, whose interests were in this way being cared for, had a contract with the United States government to furnish certain supplies; plaintiff made his several advances to enable the company to fulfil this contract, the latter and defendant stockholders agreeing that, on receipt of the cash consideration from the government, \$82,800, it would be promptly turned over to plaintiff. The amount named was accordingly received and duly credited on the books of the corporation, leaving a balance due plaintiff of \$38,199.98.

Defendants did not dispute any of the facts thus far stated, but rested on the defense of payment of the notes, contending that, at the time of the execution of these obligations, there was an oral understanding, or contract, between plaintiff and defendants, to the effect that the government money was to be first applied to a prior debt of \$25,000, owing by the corporation to plaintiff, and then on the notes now before us. Defendants maintained that, if this contract were carried out, a proper appropriation of the funds received from the government

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would fully pay all of the obligations sought to be enforced by the present suit.

On the other hand, plaintiff urged that there never was any such understanding, or contract, as contended for by defendants, and that the whole of the \$82,800 was correctly credited on indebtedness due to him for moneys advanced the corporation at times prior to the execution of the notes in controversy.

The issues, growing out of the contentions just stated, were submitted to the jury and found in favor of defendants; judgments were entered accordingly, and plaintiff has appealed.

The first assignment of error complains of the admission in evidence, under objection, of a written contract between the corporation and plaintiff, relating to the before-mentioned advance, which the latter made to the former, of \$25,000. Plaintiff claims this document had no proper place in the case, and that defendant's counsel obtained its admission and used the evidence for the purpose of prejudicing plaintiff before the jury; all of which seems to be verified by the notes of the trial.

While the affidavit of defense, in one of the suits, makes a vague reference to the contract for the \$25,000 advance, intimating that this latter writing provided a method for appropriating the government money, which accords with the defense set up at trial, yet, when the document is read, there is nothing in it that bears out this intimation. In point of fact, the \$25,000 advance was made about a year before any of the present notes were given, and the contract under discussion contains no reference to future loans.

The averment that there was a \$25,000 advance made by plaintiff to the corporation, which, according to the defense entered, was to be first paid out of the funds coming from the government, the notes in suit to be next paid from these funds, made the bare fact of such an advance relevant at the trial; but the contract concerning the details of that advance, in no way referring to the

notes in suit, was entirely irrelevant, and when objected to should not have been admitted. That its admission was prejudicial to plaintiff can well be believed, for the writing, on its face, has the appearance of an usurious agreement, with many hard terms favorable to plaintiff.

The record shows a statement by the trial judge to the effect that, had he realized the use which could be made of the evidence in question, and was made of it, he would have rejected the document; but the court below seemed to believe that its admission for purposes of cross-examination was proper. With this we cannot agree, nor can we agree that the trial judge's instructions to the jury,—to disregard the suggestions of defendants' counsel about the terms of the contract proving plaintiff to be a cheat—obviated the harm done by its admission; on the contrary, it seems to us that the instructions, albeit intended otherwise, might have had a tendency to aggravate the harm already done.

True, when on the stand under cross-examination, plaintiff was asked several questions concerning the contract for the \$25,000 loan (the witness then making no denial of the points on which he was interrogated), without objection on part of his counsel; but when the contract itself, covering many terms other than those referred to on plaintiff's prior examination, was offered in evidence, his counsel promptly protested, stating that, while he had entered no objections before, yet now he objected to the "agreement.....offered as a whole"; and, upon the overruling of this objection, an exception was noted.

The admission of the evidence under discussion, and the use subsequently made of it, constitutes harmful error, which, on all the facts shown by this record, cannot be overlooked.

For recent cases on the extent to which cross-examination may be properly carried, and the limitations thereon, see *Murdoch v. Biery*, 269 Pa. 577; *Kane v. P. R. T. Co.*, 248 Pa. 160; *Lesley v. Ewing*, 244 Pa. 480;

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also, see *Colonial Trust Co. v. Getz*, 28 Pa. Superior Ct. 619.

The first assignment of error must be sustained and this will result in a new trial; therefore it seems proper to touch upon several other matters of complaint, in the hope that, at the next hearing of this case, like trial faults may be avoided.

To begin with, the stenographer's notes strongly suggest the thought that counsel for defendants set out to confuse, rather than enlighten, the court and jury, and to prejudice the latter against plaintiff and his counsel; we take occasion to say that verdicts won by such means have little chance of standing on appeal, when any specific error appears of record which fairly can be accounted reversible.

In connection with what we have just said, the whole course of examination by insinuations that plaintiff had endeavored to have the corporation books "doctored" for his benefit,—with which counsel for defendant arrived nowhere, and which the trial judge properly called "mud-slinging,"—should, unless defendants can prove their charges, be omitted at another trial; and, of course, the objectionable references by the latter's counsel to the religious beliefs of counsel for plaintiff will not again be indulged in; nor should counsel for defendants be permitted, in his examination of plaintiff, to refer to him in an offensive manner as a "rich" man. These methods have no proper place in a trial of purely business issues, such as presented by this case; they serve only to beguile and prejudice the jury, and are not to be tolerated.

It may be well to say that, at the next trial, counsel should endeavor to get defendants' witnesses to state facts, from which the jury may draw conclusions, rather than merely stating their own conclusions as to what occurred when the alleged oral agreement, upon which defendants rest their case, was made. At the last trial, instead of these several witnesses telling the material things said by the respective parties at the time under

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investigation, so that a jury, or we on review, might determine what the alleged agreement amounted to, they simply gave their own conclusions on the points at issue, saying that certain terms were "agreed to," or "agreed upon," or "understood" between the "makers of the note and Dr. Stybr." These are fair examples of the testimony, and it can readily be seen therefrom that such evidence presents merely the ideas or conclusions of the various witnesses on the main issue in the case—not detailed proofs from which a reasonable conclusion might be drawn by others; which, of course, is insufficient: *Smith v. Standard Steel Car Co.*, 262 Pa. 550, 555-7; *Sorber v. Masters*, 264 Pa. 582, 587.

When proofs of the character just indicated are properly objected to, and defendants thus given notice, and afforded opportunity, to put in better evidence, if they fail in that regard, and the verdict depends for support upon such faulty proofs, this may be fatal on appeal.

The several judgments are reversed with a *venire facias de novo* in each case.

Donnelly's Estate.

Decedents' estates—Ownership of personal property—Widow—Review—Executors and administrators—Gifts—Evidence—Estoppel.

Where a widow claims household goods and paintings as her own property at the time of the inventory of her husband's estate, but they are included in the inventory without her knowledge, and the executor's account is audited and decree of distribution made, the household goods and paintings remaining in the widow's possession, the widow is entitled, eleven years after the death of her husband, to a bill of review, and, on such review, if the evidence is sufficient to show that the goods were gifts to the claimant from the husband, she will be entitled to have them awarded to her. In such case the widow is not estopped.

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Argued October 13, 1921. Appeals, Nos. 126, 127 and 128, Oct. T., 1921, by First National Bank of Pittsburgh, from decrees of O. C. Allegheny Co., Feb. T., 1908, No. 112, April T., 1909, No. 188, and June T., 1913, No. 129, dismissing exceptions to adjudication on bill of review, in estate of Charles Donnelly, deceased. Before FRAZER, WALLING, SIMPSON, SADLER and SCHAFFER, JJ. Affirmed.

Bill of review. Before TRIMBLE, J.

The opinion of the Supreme Court states the facts.

The court dismissed exceptions to the adjudication.

The First National Bank of Pittsburgh appealed.

Error assigned, inter alia, decree, quoting it.

Charles Alvin Jones, with him James R. Sterrett, of Sterrett & Acheson, for appellant.

D. C. Jennings, with him Thomas Stephen Brown, for appellee.

PER CURIAM, January 3, 1922:

Charles Donnelly died testate, December 5, 1906, naming his wife, Alice R. Donnelly, his daughter, Bessie C. Donnelly and Frank F. Nicola, his business associate, as executors and trustees. Letters testamentary were granted to the persons named and they continued to administer the estate until December 11, 1907, when they resigned and the Commonwealth Trust Company of Pittsburgh was appointed administrator d. b. n. c. t. a. On January 3, 1908, two of the executors, Bessie C. Donnelly and Frank Nicola, filed an inventory and appraisement, which included paintings appraised at \$107,186.25 and household furniture at \$9,197. On the same day the executrix and executor who filed the inventory also made a first and final account in which they charged themselves with "Paintings as per inventory filed \$107,-

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186.25." Mrs. Donnelly did not file a separate account nor did she except to the one filed. The account was audited, a decree of distribution made, and, on dismissal of exceptions to the decree, an appeal was taken to this court which sustained the court below. Donnelly's Est., 246 Pa. 308. In that case the question of the ownership of the paintings and household furniture was not involved. On March 5, 1909, the administrator d. b. n. c. t. a. filed its first and partial account, in which it charged itself with the paintings and household furniture above referred to. Second and third partial accounts were filed later. In the last of these it was stated the paintings had been loaned to the Carnegie Art Gallery by Mrs. Donnelly and subsequently withdrawn from that institution by her and were at the time in her possession, she claiming them as her personal property and refusing to turn them over to the administrator. On November 3, 1919, a decree was made by the orphans' court directing her to forthwith deliver the paintings in dispute to the administrator.

This decree was followed by a petition, filed November 29, 1919, by Mrs. Donnelly, setting forth that the paintings in dispute are her individual property and that they "were improperly and mistakenly and against her protest included in the said inventory or account and that she did not know her property had been included in the inventory....., that the paintings never were the property of the estate of Charles Donnelly but were her own sole and separate property," and asking the court to grant a review of the accounts previously filed because of the error cited. Upon the petition, citations were issued to the administrator and all creditors, and answers filed. On hearing and testimony taken, the court opened the decree, restated the account and made distribution of the paintings and household effects to Mrs. Donnelly. From the decree so made the administrator has appealed.

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As indicated by the statement of questions involved, the matters for consideration are (1) the sufficiency of the testimony to sustain a gift from decedent to his wife in his lifetime and (2) estoppel of Mrs. Donnelly from denying representation of record made for her benefit.

Under Sloan's Estate, 254 Pa. 346, the court clearly had authority to make an order of review, no rights having changed in consequence of the decree, and the property remaining intact in the possession of Mrs. Donnelly, and, if shown that an error or mistake had been made, to open its decree and make such corrections as might be necessary to avoid injustice being done.

An examination of the testimony shows Mrs. Donnelly made claim to the paintings and household furniture as her own property at the time the inventory was made and protested against their being included as estate property; she did not see the inventory after it was prepared and was not aware her property had been included until several years later, and both the paintings and furniture have been in her possession and control since the death of her husband; she insured and cared for the paintings at her own expense and no attempt was made to disturb her possession of either or both until the year 1917, eleven years after the death of her husband. In establishing her ownership of the property in dispute, Mrs. Donnelly was corroborated by the testimony of a number of witnesses, members of the family and others, who testified the paintings were purchased usually one at a time by Mr. Donnelly, covering a considerable period, and, in each instance, presented to his wife at the time of purchase. It also appears that decedent frequently declared to his friends that the paintings and household furniture belonged to his wife.

At the time of the death of decedent his estate was believed to be solvent and not until several years afterwards, when, owing to a change in trade conditions and both real property and personal securities had depreci-

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ated greatly in value, was it found the liabilities of the estate exceeded its assets.

We find nothing in the record to sustain the contention that Mrs. Donnelly is estopped from now asserting her title to the property in controversy. As stated above, she gave notice of her ownership at the time the inventory was prepared and protested against the property being included therein and nothing appears in the record to indicate she was aware, or had reason to believe, her protest was disregarded, and, so far as either the record or testimony shows, no one was misled or prejudiced by her acts or conduct.

Mrs. Donnelly, not having business experience, took no part in the management of the estate of her husband, while acting as executrix, beyond advancing money from her own estate to her coexecutors to be used for the protection of her husband's property.

After reading the testimony and giving it full consideration, we can reach no other conclusion than that reached by the court below that "The testimony of interested and disinterested witnesses all point unerringly and without contradiction to the conclusion that the decedent made a gift of his paintings and household furniture to his wife in his lifetime."

The decree of the court below is affirmed at the cost of appellant.

Hastings et al., Appellants, v. South Shore Railroad Co.

Negligence—Railroads—Joint use of tracks by two companies—Death—Case for jury—Contributory negligence—Anticipating negligence—Judgment n. o. v.

1. Where two railroad companies jointly use the same tracks, each is required to exercise reasonable care to avoid injury to the servants of the other.

1922.] Syllabus—Assignment of Error.

2. Where a freight conductor of one company is killed while throwing a switch in the operation of his own cars, by a moving car of the other company, and the evidence tends strongly to show that the operation of such car was negligent, and there was nothing shown to put the deceased upon notice that the train which struck him was likely to approach, the case is for the jury.

3. In such case deceased was not required to anticipate negligence on the part of defendant.

4. Where the issue of contributory negligence has been submitted to the jury, a finding in favor of plaintiff will not be set aside unless, on a review of the evidence in the light most favorable to plaintiff, it is inconceivable that a mind desiring only a just and proper determination of the question could reasonably reach any other conclusion than that plaintiff had brought on or contributed to the injury by his own carelessness.

Argued October 13, 1921. Appeal, No. 132, Oct. T., 1921, by plaintiffs, from judgment of C. P. Allegheny Co., July T., 1914, No. 1695, for defendant n. o. v., in case of Gertrude Hastings and Harry Hastings, by their guardian, the Fidelity Title & Trust Co. of Pittsburgh, v. South Shore Railroad Co. Before FRAZER, WALLING, SIMPSON, SADLER and SCHAFER, JJ. Reversed.

Trespass for death of plaintiff's father. Before CARPENTER, J.

The opinion of the Supreme Court states the facts.

Verdict for plaintiff for \$8,125. The court entered judgment for defendant n. o. v.

Error assigned, inter alia, judgment for defendant n. o. v., quoting record.

Fred Shoemaker, of *Shoemaker & Knoell*, with him *I. L. Griffin*, for appellant.

W. S. Dalzell, of *Dalzell, Fisher & Dalzell*, for appellee.

OPINION BY MR. JUSTICE WALLING, January 3, 1922:

The Pittsburgh & Lake Erie Railroad Company has, in Pittsburgh, a system of five tracks from Point Bridge westerly along the south bank of the river; the one furthest south being a siding called "Wightman's lead" and, from it, the other tracks are numbered 1, 2, 3, and 4; a switch track, extending down from the south, curves to the west and intersects the Wightman lead near the bridge, thence continuing westerly crosses over the tracks to the north, so that cars coming down on the switch track can enter the lead, or the main tracks, according as the switches are thrown.

Frank H. Hastings, the deceased, was conductor on a local freight train of the P. & L. E. R. R. Co., and, at about 6 o'clock p. m. of February 12, 1914, he put some cars in on the switch track near the bridge, and, in returning his engine to the main track, stepped down to throw the necessary switches. One was a ground switch located between the Wightman lead and track No. 1; and, as Hastings was stooping over and proceeding in the usual manner to throw this switch, he was struck and killed by one of the defendant's cars moving westerly on the Wightman lead. By some unexplained traffic arrangement, defendant was permitted a joint use of these tracks, and, on the occasion in question, one of its engines was shoving a train of seven or eight freight cars down the switch track near the bridge, thence around the curve and westerly on the Wightman lead. The train was moving six or eight miles an hour, without a man or light on the front car, and no warning was given of its approach. By reason of the curve or intervening buildings, the first car of the train did not come in sight of Hastings until within one hundred feet, while the rear car and engine did not round the curve until after the accident. It was such a train as very rarely used these tracks and the sound of its approach was drowned by the noise of other trains and the traffic upon the bridge. The deceased stood with his back to the Wightman lead

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and, being a lock switch, it required his presence there an appreciable length of time, estimated at about one minute. At the trial of this suit, brought on behalf of Hastings' minor children, defendant submitted no testimony and the facts we have stated are as shown by plaintiff's evidence. The jury found for the plaintiffs, but later the trial court entered judgment for defendant n. o. v. on the ground of contributory negligence; and therefrom plaintiffs brought this appeal.

The case was rightly submitted to the jury and the entry of judgment for defendant n. o. v. was error. Defendant's negligence, in rapidly shoving its cars out into and along the siding, in the dusk of evening, without guard, light, warning, or any one placed thereon where he could look ahead, is so clear as not to require comment. Where two railroad companies use the same tracks each is required to exercise reasonable care to avoid injury to the servants of the other: *Rheingans v. N. Y. C. & St. L. R. R.*, 236 Pa. 476; *Kunsman v. Lehigh Valley R. R. Co.*, 10 Pa. Superior Ct. 1; *Engle v. Penna. R. R. Co.*, 234 Pa. 305. See also *Dutrey v. Phila. & R. Ry.*, 265 Pa. 215.

The rule as to when contributory negligence will justify the entry of judgment for defendant n. o. v. is well stated by the present Chief Justice in *Cramer v. Aluminum Co.*, 239 Pa. 120, 125, as follows, viz: "Where the issue of contributory negligence has been submitted to the jury, a finding in favor of the plaintiff will not be set aside unless, upon a review of the evidence in the light most favorable to the plaintiff, it is inconceivable that a mind desiring only a just and proper determination of the question could reasonably reach any other conclusion than that the plaintiff had brought on or contributed to the injury by his own carelessness. That is, after determining all doubts and drawing all inferences in favor of the plaintiff, it must be clear that he was guilty of contributory negligence before it can be so ruled as a matter of law." See also *Vannatta v. Cent.*

R. R. of N. J., 154 Pa. 262; Edsberg v. Baldwin L. Works, 240 Pa. 614, 618. There was nothing to put the deceased upon notice that such a train was likely to approach and he was not required to anticipate negligence on part of defendant: Wagner v. Phila. R. T. Co., 252 Pa. 354. He is presumed to have used due care (Di Ordio v. Director Gen. of R. R., 270 Pa. 112; Nadazny v. Phila. & R. Ry., 266 Pa. 307), and it cannot be declared as a matter of law that this presumption is overcome by the evidence.

The right and duty of a workman upon the track are not to be measured by that of a traveler at a railroad crossing; the former must necessarily give attention to his work, and, while he must give heed to his own safety, he cannot be required to keep as constant a watch as the traveler: Van Zandt v. Phila., B. & W. R. R. Co., 248 Pa. 276. Hastings could not constantly watch out while he stooped to throw the switch, and, as the train ran the distance of its visible presence (one hundred feet) in less than twelve seconds, the fact it struck him does not necessarily show his default. Reasonable minds seeking for the truth might reach an opposite conclusion; it was therefore for the jury to decide: Di Ordio v. Director Gen. of R. R., supra.

Stoker v. Phila. & R. Ry., 254 Pa. 494, relied upon by the trial court, is not a parallel case. There Stoker, an employee of defendant, was not working on or near the track where he was struck, but merely walking across it and stepped in front of a moving car, which he could have seen and avoided. Moreover, that case disclosed no sufficient evidence of negligence on part of defendant. Bardis v. Phila. & R. Ry., 267 Pa. 352, also differs from the present case, in that plaintiff's work did not require him to be at or near the track where he was hurt, and, in addition, the evidence there failed to show negligence on part of defendant.

The judgment is reversed and the record is remitted to the court below that judgment may be entered for the plaintiffs upon the verdict.

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Syllabus—Assignment of Error.

Nolan, Appellant, v. Pittsburgh.

Negligence—Municipality—Sidewalk—Ice and snow—Knowledge of unsafe condition—Contributory negligence—Choice of two ways.

1. Where a woman has knowledge of the rough surface of an unpaved portion of a sidewalk, and, in walking along the sidewalk in broad daylight, at a time when it is covered with ice and snow, steps from the smooth even pavement to the portion she knew was rough, she does so at her own risk, and if she falls and is injured, she cannot hold the municipality liable; and especially is this so where it appears that she could have used the car tracks in the centre of the street which were clear of ice and snow and used by many pedestrians.

2. Under the facts of this case defendant was not guilty of negligence.

Argued October 13, 1921. Appeal, No. 133, Oct. T., 1921, by plaintiff, from judgment of C. P. Allegheny Co., July T., 1918, No. 1839, on verdict for defendant, in case of Sarah Nolan v. City of Pittsburgh. Before FRAZER, WALLING, SIMPSON, SADLER and SCHAFFER, JJ. Affirmed.

Trespass for personal injuries. Before CARPENTER, J. The opinion of the Supreme Court states the facts.

Verdict and judgment for defendant. Plaintiff appealed.

Error assigned was binding instructions for defendant, quoting record.

Meredith R. Marshall, with him *Rody P. Marshall*, for appellant.

Charles B. Prichard, City Solicitor, and *Herman F. Ruoff*, Assistant City Solicitor, for appellee, were not heard.

PER CURIAM, January 3, 1922:

Plaintiff sued to recover damages for injury received while walking on the sidewalk of South Eighteenth Street in the City of Pittsburgh. Defendant offered no evidence and the lower court directed a verdict in its favor. Plaintiff appealed.

From the evidence it appears plaintiff left her home about 8:30 in the morning of January 21, 1918, for her place of employment, walking on the sidewalk of the street which has a considerable down grade and at the time was covered with ice and snow. In stepping from a paved to an unpaved portion of the sidewalk, the latter being eight or ten inches below the former, plaintiff slipped and fell, her foot turning under her and sliding into a frozen depression that "looked like a footprint or something of that kind." As the result of her fall she sustained a fracture of the small bone of the ankle. Plaintiff had been using South Eighteenth Street for more than a year in going to and returning from her place of employment and was familiar with its condition, having walked down the street a week or ten days previous to the accident, at which time she observed the rough surface of the unpaved sidewalk in front of the premises No. 2663, the place where she slipped and fell. At the time of the accident there were five and one-half inches of snow on the ground, the thermometer registered zero and all streets throughout the city were "extremely slippery."

Plaintiff, having knowledge of the condition of the unpaved sidewalk at the place of the accident, was required to use great care and be vigilant to see unsafe and dangerous places, especially dangerous spots directly in her path. She was fully aware of the pavement's condition, according to her own testimony, and, having that knowledge, while passing over it in broad daylight when covered with ice and snow, in stepping from the smooth, even pavement to the portion she knew was rough, she did so at her risk; especially is this

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the case where, as here, she might have avoided the rough, slippery part of the sidewalk by using the car tracks in the center of the street which had been cleared of snow and were used by many pedestrians.

The trial judge gave no reasons for affirming defendant's point for binding instructions or for refusing plaintiff's motion for a new trial. We have, however, read the evidence carefully and can reach no other conclusion than that plaintiff failed to exercise that degree of care the circumstances required, consequently a verdict was properly directed for defendant.

In addition to what has been said above, it may be stated that the facts do not show any negligence on part of defendant.

The judgment is affirmed.

Craig v. Riter Conley Mfg. Co., Appellant.

Negligence—Employee of independent contractor—Moving crane—Warning—Notice—Master and servant—Contributory negligence—Case for jury.

1. In an action by an employee of an independent contractor to recover damages for personal injuries suffered while at work on alterations in defendant's building, the case is for the jury, where the evidence, though contradicted, tends to show that plaintiff was injured while standing on a girder, by the end of a moving crane striking him, that defendant's foreman knew of the presence of defendant, promised to protect him, but had failed to do so by giving the usual warning by gong, and that the man operating the crane could have seen plaintiff if he had looked.

2. The presence of plaintiff on the girder, in view of all the circumstances, could not convict him of contributory negligence as a legal conclusion.

3. The work being done was for the mutual benefit of all parties and plaintiff was in the plant by the implied invitation of defendant company, which was therefore bound to use reasonable care for his safety.

220 CRAIG v. RITER CONLEY MFG. CO., Appellant.

Statement of Facts—Opinion of the Court. [272 Pa.

Argued October 14, 1921. Appeal, No. 134, Oct. T., 1921, by defendant, from judgment of C. P. Allegheny Co., April T., 1920, No. 1058, on verdict for plaintiff, in case of Harry N. Craig, in his own right, and Harry N. Craig for the use of Hughes-Foulkrod Co., etc., v. Riter-Conley Manufacturing Co. Before FRAZER, WALLING, SIMPSON, SADLER and SCHAFFER, JJ. Affirmed.

Trespass for personal injuries. Before HAYMAKER, J. The opinion of the Supreme Court states the facts.

Verdict and judgment for plaintiff for \$25,000. Defendant appealed.

Error assigned, inter alia, was refusal of judgment n. o. v., quoting record.

William A. Challener, with him *Charles S. Crawford* and *Clarence Burleigh*, for appellant, cited: *Powell v. Smith Co.*, 237 Pa. 272; *Parks v. Foundry & Machine Co.*, 234 Pa. 463; *Lowry v. Locomotive Works*, 253 Pa. 87; *Edsberg v. Locomotive Works*, 240 Pa. 614.

Ephraim W. Langfitt, with him *Rody P.* and *M. R. Marshall*, for appellee, cited: *Foster v. Steel Co.*, 216 Pa. 279; *Perry v. Payne*, 217 Pa. 252; *Van Zandt v. R. R.*, 248 Pa. 276; *Reed v. Ry.*, 243 Pa. 562; *Bennett v. R. R.*, 102 U. S. 577.

OPINION BY MR. JUSTICE WALLING, January 3, 1922:

In defendant's original factory building at Leetsdale, near Pittsburgh, was a crane with a cross-beam forty feet long and supported at each end by a steel girder twenty-two inches in width. The crane was about thirty feet above the floor, and ran the length of the building (580 feet) upon iron rails fastened to the top of the girders, while the operator stood in an open cage suspended from the crane. In 1919 defendant erected a large addition to its factory, which extended the entire

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length of the old building and necessitated the removal of the intervening brick wall. A contract for the addition was let to the Hughes-Foulkrod Company, by whom plaintiff was employed as a carpenter. It was necessary for the workmen, engaged in the construction of the new building and in attaching it to the old, occasionally to be around and upon the steel girder which extended along the inside of the old wall.

On July 1, 1919, plaintiff, while engaged in placing a wooden post as a temporary support to a concrete gutter, found it necessary to stand upon this girder where he was struck and permanently injured by the end of the moving crane beam. There was some conflict in the evidence but it justified a finding that defendant's crane foremen knew of the presence of the workmen upon and around the girder and had promised to protect them, and that for the three days preceding the accident such protection had been uniformly given by sounding the gong whenever the crane was moving in the vicinity of the workmen. Admittedly no warning was given on the occasion of the accident. The crane operator could have seen plaintiff in ample time to avoid the accident had he glanced that way, but excuses his failure to do so on the ground that it was his duty to look down at the floor and that he had no knowledge of plaintiff's presence on the girder. The trial judge submitted the case to the jury who found for the plaintiff; and, from judgment entered thereon, defendant brought this appeal.

The only complaint of appellant is that the trial court should have decided the case in its favor as a matter of law, and that we cannot sustain. The work being done was for the mutual benefit of all parties and plaintiff was there by the implied invitation of the defendant company, which was therefore bound to use reasonable care for his safety: *Reed v. Pitts., C. & St. L. Ry. Co.*, 243 Pa. 562; *Newingham v. J. C. Blair Co.*, 232 Pa. 511; *Papilios v. Best Mfg. Co.*, 58 Pa. Superior Ct. 70. And see *Thorson v. Carnegie Steel Co.*, 238 Pa. 166; *Powell*

v. S. Morgan Smith Co., 237 Pa. 272. While the evidence was conflicting it sustains a finding of defendant's negligence, although the jury might have found the facts otherwise. The contractor's men were known to be working about the girder from time to time and, in view of this fact, the failure of the crane operator to glance in that direction while moving along the track or to give any warning were circumstances for the jury to consider on the question of his neglect.

The noise of the factory and of the work upon the new building naturally prevented plaintiff from hearing the approach of the crane, as his stooped position, while driving in the post, prevented him from seeing it. He was bound to be vigilant for his own safety; yet, in view of the promise of protection and its fulfilment theretofore, his presence on the girder, in the performance of his work, cannot convict him of contributory negligence as a legal conclusion. Whether, under the circumstances, plaintiff exercised due care for his own safety was a question of fact (*Van Zandt v. Phila., B. & W. R. R. Co.*, 248 Pa. 276), as was the question of the necessity of his standing on the girder while doing his work. The cases of *Lowry v. Baldwin Locomotive Works*, 253 Pa. 87, and *McNeil v. Clairton Steel Co.*, 213 Pa. 331, cited for appellant, are not controlling; for in each the workman voluntarily put his hand on the crane track without necessity, when he might have steadied himself conveniently and safely by holding to a brace or flange.

Plaintiff was doing necessary work and the fact that he had not been directed by the foreman to set that particular post is unimportant.

The judgment is affirmed.

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Syllabus—Opinion of Court below.

Shornhorst v. Jacob, Appellant.

Will—Construction—Estate in fee simple—Power to convey in fee—Devise to son.

1. Where a testator devises real estate to his son, and if the son dies unmarried, then over, but if the son is married then to his children, followed by a provision for the son's widow if the son has no children, at his death, and a final direction that on the widow's remarriage "then the remaining property he [the son] has not sold shall go back to" testator's remaining children, the son takes an estate in fee simple, or at least the power to sell it in fee.

2. In such case the provision "if my son" dies married or not married is to be deemed to refer to death in the lifetime of testator.

Argued October 14, 1921. Appeal, No. 139, Oct. T., 1921, by defendant, from judgment of C. P. Allegheny Co., July T., 1921, No. 2498, for plaintiff on case-stated, in suit of William Albert Shornhorst v. Hubert B. Jacob. Before FRAZER, WALLING, SIMPSON, SADLER and SCHAFER, JJ. Affirmed.

Case-stated to determine marketability of real estate.

SHAFFER, P. J., filed the following opinion:

The action is assumpsit for the purchase money of land and the parties have filed a case-stated in the nature of a special verdict which makes the determination of the case dependent on the question of whether or not the plaintiff took by his father's will such title to the land which he agreed to sell that his general warranty deed to the defendant would vest in the latter a good and marketable title in fee simple.

The will in question was evidently drawn by a person very little versed in such matters. In the first four paragraphs of the will the testator gives to his daughters life estates in certain lands. In the fifth paragraph he gives to the plaintiff, his son, the land in question in this case, saying that he gives it to him because he had to work

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for it and that he had worked for him without any pay during all these years. The sixth paragraph provides for giving his daughters who should become widows after a certain age a fee instead of a life estate in the properties which he gave them in the first part of the will, and then proceeds, "And if my said son dies and is not married, his share of the property that is left to him shall be rented and the taxes and insurance and repairs is made and all is paid for then the balance of the money that is left shall go to my remaining children share and share alike. But if he is married and child or children they shall have his share and share alike after the death of his widow or when she marry again after her marriage it go to his children if any, if no children at his death or thereafter his widow is to receive one-third of the income of the property, the two-thirds is to pay taxes and other expense that may come to be paid and balance of the money that is left shall go to my remaining children share and share alike. If she marries again the income or the one-third paid to her stops thereafter. If he has no children living at the time of her remarriage again then the remaining property he has not sold shall go back to my remaining children or their children share and share alike."

In determining what estate the testator intended to give to his son, it may be observed in the first place that he well knows the distinction between life estate and a fee, and immediately after giving his daughters life estates he gives the land in question to his son, giving as a reason that he had worked for it. It is further to be noted that in winding up his painful attempt to provide for all the contingencies he can think of in regard to his son and his wife, and children, if he has any, he provides that in case the provision he is trying to make for his son's widow shall cease and there is no child of his son living, "then the remaining property he has not sold shall go back to my remaining children." From this it is to be plainly inferred that he believes he was giving his

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son the land in such a manner that he could sell it. This is practically equivalent to the word "residue" discussed in the case of *Jaureche v. Proctor*, 48 Pa. 466.

Having these indications of the testator's intentions in mind, we proceed to the consideration of the principal question in the case, which is whether the provision "if my son dies," married or not married, is to be deemed to refer to death in the lifetime of the testator or not. It is a well established rule of interpretation that where it is provided that if the devisee to whom a fee has been given by the will should die or should die without leaving issue, it is not a limitation upon the estate of the devisee, but is a devise over upon the contingency of death in the testator's lifetime. *Mickley's App.*, 92 Pa. 514; *Mitchell v. Ry.*, 165 Pa. 645, and many other cases. The only difficulty in applying this rule to the present case is the provision that the share given to the son in case of his death, unmarried, is to be rented and the income paid to the other children of the testator, it being suggested that it is unlikely that the testator should direct the renting of property still in his own hands. We see no reason, however, why the testator may not have meant that "if my son dies before I do, unmarried, then at my death the property shall be rented," and the same thing may apply to the provision of his dying and leaving a wife and children. Taking the whole of the will together, we are clearly of opinion that the testator gave the plaintiff a fee in the land in question, or at least gave him full power to sell it in fee. It is therefore ordered, in conformity with the provisions of the case-stated, that judgment be entered for the plaintiff and against the defendant in the sum of \$14,000, payable upon delivery by the plaintiff to the defendant of a general warranty deed for the lands described in the case-stated.

June 24, 1921, after hearing, it is therefore ordered in conformity with the provisions of the case-stated, that judgment be entered for the plaintiff and against the defendant in the sum of \$14,000 payable upon delivery by

Assignment of Error—Opinion of the Court. [272 Pa. the plaintiff to the defendant of a general warranty deed for the lands described in the case-stated.

Error assigned, inter alia, was above judgment, quoting record.

William L. Jacob, for appellant, cited: *Allen v. Hirlinger*, 33 Pa. Superior Ct. 113; *Martin v. Heckman*, 25 Pa. Superior Ct. 451; *Hunt's Est.*, 133 Pa. 260; *Todd's Est.*, 33 Pa. Superior Ct. 117; *Gross's Est.*, 10 Pa. 360.

Harry J. Graham, for appellee, cited: *Jackson's Est.*, 179 Pa. 77; *Morrison v. Truby*, 145 Pa. 540; *Mitchell v. Ry.*, 165 Pa. 645; *Richards v. Bentz*, 212 Pa. 93; *Hannon v. Fliedner*, 216 Pa. 470; *Stark's Est.*, 264 Pa. 232.

PER CURIAM, January 3, 1922:

The judgment in this case is affirmed on the opinion of the learned President Judge of the court below.

Crumley v. Pennsylvania Railroad Co., Appellant.

Negligence—Railroads—Master and servant—Safety appliance—Defect—Federal Act of March 21, 1893—Coupling cars—Contributory negligence—Case for jury—Verdict—Damages—Excessive verdict.

1. In an action by a brakeman against his employer for personal injuries, the case is for the jury, where it appears that plaintiff, while engaged in interstate commerce, was injured by the failure of a coupling lever to work, and the evidence tends to show that the coupling pin was bent, and that the conductor in charge of the train, after the accident, experienced difficulty in working the device, and was obliged forcibly to strike the lever a number of times before it would operate.

2. Under the Federal Employer's Liability Act, contributory negligence of plaintiff is no defense, if a defect in a coupler caused or contributed to his injury.

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3. A verdict of \$8,120, in an accident case, will not be held excessive if it appears that plaintiff's injury was a crushed foot, resulting in a permanent impairment, and causing difficulty in walking.

Practice, C. P.—Charge—Judge expressing opinion—Jury cautioned.

4. A judgment on a verdict will not be reversed because the trial judge expressed an opinion that plaintiff would not be able to earn as high a compensation after the accident as before, where the judge subsequently instructs the jury they are not to be influenced by any of his words but to take their own view of matters of fact.

Appeals—Statement of question involved—Excessive verdict.

5. An objection that a verdict is excessive is not properly before the appellate court where it is not included in the statement of questions involved.

Argued October 14, 1921. Appeal, No. 144, Oct. T., 1921, by defendant, from judgment of C. P. Allegheny Co., Oct. T., 1920, No. 475, on verdict for plaintiff, in case of Edward T. Crumley v. Pennsylvania Railroad Co. Before FRAZER, WALLING, SIMPSON, SADLER and SCHAFER, JJ. Affirmed.

Trespass for personal injuries. Before SHAFER, P. J. The opinion of the Supreme Court states the facts.

Verdict and judgment for plaintiff for \$8,120. Defendant appealed.

Errors assigned, inter alia, were (1) refusal of judgment for defendant n. o. v. and (2) refusal of new trial, quoting record.

Robert D. Dalzell, of *Dalzell, Fisher & Dalzell*, for appellant.

J. Thomas Hoffman, for appellee.

OPINION BY MR. JUSTICE FRAZER, January 3, 1922:

Defendant appeals from a verdict and judgment awarding plaintiff damages for injury sustained while

attempting to operate a car coupler. Plaintiff alleged the coupler was defective and brought suit under the provisions of the Federal Safety Appliance Act of March 21, 1893, 27 Stat. 531.

Plaintiff, an employee of defendant as a yard brakeman at its Sharpsburg yard, was, at the time of receiving his injury, attempting to uncouple cars which were being pushed over an elevated track in the yard known as "the hump," used for the purpose of distributing cars to their proper places on various tracks in the process of making up trains. The cars were equipped, as required by the Act of 1893, with side lift levers for the purpose of operating the coupling device by withdrawing the coupling pin without the brakeman placing himself between the cars. Plaintiff testified he endeavored several times unsuccessfully to uncouple the cars in question from the side by means of the lift lever and had climbed between the cars to accomplish what the lever failed to do and, while attempting to release the coupling by hand, his foot slipped and was caught between the bumpers and crushed. It is not denied that the car he was endeavoring to uncouple was at the time engaged in interstate commerce and that plaintiff was within the protection of the Federal Safety Appliance Act and cannot be held to have assumed the risk of a defective coupler; and further, since the passage of the Federal Employers' Liability Act of 1908, which, in effect, amends earlier legislation, contributory negligence of plaintiff is no defense if a defect in the coupler caused or contributed to his injury. The argument of appellant is that there was an entire lack of evidence tending to show an imperfect coupler; that the Safety Appliance Act was not violated and that the risk was one which plaintiff assumed as an ordinary incident to his employment within the decisions of this court in *Dutrey v. R. R.*, 265 Pa. 215; *Reed v. Direct. Gen.*, 267 Pa. 86; *Curtis v. R. R.*, 267 Pa. 227. Although the exact cause of the failure of the coupling lever to work does not appear, there is evidence that the

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pin was bent. Though none of the witnesses testify positively that the defective condition of the pin was the cause of plaintiff's inability to uncouple the cars, there was evidence that the conductor in charge of the train, after the accident, experienced difficulty in working the device and was obliged to forcibly strike the lever a number of times before causing it to operate. Under these circumstances the jury might justly infer the bent condition of the pin rendered its release more difficult than if in proper condition. The trial judge, accordingly and properly left this question to the jury. In this we think he is sustained by *Chicago, R. I. & Pac. Ry. v. Brown*, 229 U. S. 317; *San Antonio Ry. v. Wagner*, 241 U. S. 476; and *Phila. & Read. Ry. v. McKibbin*, 259 Fed. 476.

In the first case cited it was conceded the failure of a coupler to work at any time was sufficient to sustain a charge of negligence against the company. In *San Antonio Ry. v. Wagner*, plaintiff was injured while attempting to operate by hand an automatic coupler which failed to work. It was there argued by defendant that all automatic couplers required adjustment at times, the court, however, in reply to this contention, said (page 484): "The jury could reasonably find that the misalignment of the drawbar was greater than was required to permit the rounding of curves, or, if not, that an adjustment lever should have been provided upon the engine as upon the car, and that there was none upon the engine. We need not in this case determine, what was conceded in *Chicago, R. I. & Pac. Ry. v. Brown*, 229 U. S. 317, 320, that the failure of a coupler to work at any time sustains a charge that the act has been violated."

The language of the court in *Phila. & Read. Ry. v. McKibbin*, *supra*, is particularly applicable here. It was there said (page 478): "The case then presents the question whether the repeated and unsuccessful efforts, by an experienced person, to operate the lever of an automatic coupler, when there are no circumstances con-

sistent with its being in repair and workable condition to explain the inability to successfully operate it at a given time when, under the statute, it should be in working order, without other evidence of its defective condition, is sufficient to permit the inference that the coupler was not in the condition required by the statute when the efforts to operate it were made. This question has received an affirmative answer by the Circuit Court of Appeals of the Sixth Circuit in *Nichols v. Chesapeake & Ohio Ry. Co.*, 195 Fed. 913, 917, 115 C. C. A. 601. With the conclusion thus reached we are in accord. We do not wish to be understood, however, as holding what seems to have been conceded in *Chicago, R. I. & Pac. Ry. Co. v. Brown*, 229 U. S. 317, 320, 33 Sup. Ct. 840; 57 L. ed. 1204; and what the court, in *San Antonio Ry. v. Wagner*, 241 U. S. 476, 484, 36 Sup. Ct. 626, 629 (60 L. ed. 1110), expressly found it unnecessary to determine, 'that the failure of a coupler to work at any time sustains a charge that the Safety Appliance Act has been violated'; nor do we wish to be understood as intimating any opinion upon that question. We merely decide that the failure of the coupler to work under the circumstances above detailed is some evidence, the weight of which is for the jury under all the circumstances of a given case, that the coupler was not in the condition required by the act, when the plaintiff was injured."

In the present case we have not only evidence that the coupler refused to work until force had been applied to the lift lever by the conductor, but the additional fact that the coupling pin was bent, which justified the jury in concluding its defective condition made it more difficult to operate and was the cause of its failure to function at the time plaintiff received his injury.

It is also argued that the pin could not be drawn owing to the weight of the cars against it; an answer to this is that plaintiff, an experienced brakeman, testified he be-

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gan his efforts to release the coupler while the cars were being pushed upgrade and the couplings were slack.

A further contention is that the verdict is excessive and that the trial judge erred in that part of the charge expressing an opinion that plaintiff was unable to earn as high a compensation for his services after the accident as before. The injury sustained was a crushed foot, resulting in a permanent impairment and causing difficulty in walking, which the jury might infer would decrease his earning capacity. The charge as a whole was fair and at the end the jury were further instructed that they were not to be influenced by suggestion or opinion on the part of the court but to take their own view of matters of fact. No harm was done and under the circumstances a verdict of \$8,120 is not so excessive as to justify this court in setting it aside. Furthermore, this question is not included in the statement of questions involved and is not properly before us.

The judgment is affirmed.

Brown v. American Steel Foundries, Appellant.

Negligence—Custom—Evidence—Moving cranes—Contributory negligence—Sudden danger.

1. A custom to be good should be certain, continued, reasonable, distinct, uncontradicted, and so notorious as probably to be known to the parties to the contract.

2. To prove negligence in the operation of a plant, evidence of customary methods pursued in other like establishments is not admissible to make out plaintiff's case, except under extraordinary circumstances.

3. In an action for personal injuries by an employee of an independent contractor, against the owner of a steel plant, where it appears that plaintiff was injured while working on the runway of a crane far above the working floor, it is error to admit evidence of a custom to ring a bell as a warning of the approach of a crane, where it was not disputed that a bell was rung to warn men on the

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working floor far below, without it any where appearing that men working on the runway far above required such notice.

4. In such case, the evidence is insufficient to convict plaintiff of contributory negligence as a matter of law, where it appears that the only way that he could reach his work was by climbing past the runway, that defendant was warned to look after him and promised to do so, that it was doubtful whether plaintiff could have seen the crane approach on his ascent, but that as soon as he was in a position to see it from the runway, it was too close for him to escape.

5. Defendant could continue to operate the crane, under the circumstances, but it was bound to use reasonable care, considering the work which the employees of the independent contractor had to do.

6. Where a sudden emergency presents itself to a workman, he should not be held negligent though he may have done imprudent things thereafter.

Argued October 10, 1921. Appeal, No. 14, Oct. T., 1921, by defendant, from judgment of C. P. Allegheny Co., Jan. T., 1918, No. 1287, on verdict for plaintiff, in case of William Brown v. American Steel Foundries. Before MOSCHZISKER, C. J., WALLING, KEPHART, SADLER and SCHAFFER, JJ. Reversed.

Trespass for personal injuries. Before HAYMAKER, J. The opinion of the Supreme Court states the case.

Verdict and judgment for plaintiff for \$1,750. Defendant appealed.

Errors assigned, inter alia, (3-6) rulings on evidence, appearing by the opinion of the Supreme Court, quoting bills of exceptions.

John G. Frazer, with him *W. L. G. Gibson*, and *Reed, Smith, Shaw & Beal*, for appellant.—This case is ruled by *Lowry v. Baldwin Locomotive Works*, 253 Pa. 87.

See also, *McIntire v. Pittsburgh Steel Foundry*, 208 Pa. 34; *Lessig v. Light Co.*, 270 Pa. 299; *McNeil v. Steel Co.*, 213 Pa. 331; *Chambers v. Machine Co.*, 251 Pa. 618.

Mercedith R. Marshall, with him *Rody P. Marshall*, for appellee: *Edsberg v. Baldwin Works*, 240 Pa. 614, is almost identical with this case.

The principle of *Carroll v. R. R.*, does not apply.

OPINION BY MR. JUSTICE KEPHART, January 3, 1922:

Appellee was employed by an independent contractor in connection with the work of rebuilding and strengthening a part of appellant's foundry. A traveling crane operated in the building, in a space 700 feet long, 50 feet wide and 20 feet high; its wheels ran on ordinary rails, similar to those used on steam roads, resting on steel girders three feet six inches high. Supporting the girders were steel columns 26 feet apart, and immediately under and between them were lattice-struts of steel to strengthen and stiffen the runway. Immediately adjoining one of these columns, outside the runway and 75 feet from one end, was a column supporting the roof of the building. Appellee was punching holes in the roof column a few feet above and outside the runway, on a small platform or hanging scaffold. The only way to reach the place of work, as he stated, was to climb to the runway, swing round the roof column to the scaffold outside and clear of the runway. He had been at work five or six weeks and was well acquainted with the character of the duties. He knew cranes were in continuous operation while the rebuilding was going on, and that a moving crane was a dangerous piece of machinery. Defendant likewise knew plaintiff was working at this particular place, what his duties consisted of, and that he would occasionally be called from his work above to the floor beneath. While plaintiff assumed the usual risks of his employment, he did not assume the unusual risk that defendant would neglect reasonable precaution to safeguard him while going to and from his work. On the morning of the accident, after working for some time, he was compelled to leave, soon thereafter returning. In an effort to ascend he climbed the open-

work of the column, swung onto the lattice-strut and in this position permitted a crane to pass. He then proceeded, first leaning around the column to ascertain whether another crane was coming. Seeing none, he continued his ascent to the runway, but was scarcely located on it when a crane was discovered within thirty feet, moving rapidly towards him. In getting back to a place of safety he slipped from the runway, and, presumably grasping wildly, in some way his fingers were pinched between the wheels of the crane and the track. He recovered a judgment in the court below and defendant takes this appeal, arguing appellee was guilty of contributory negligence, and that the court below made some trial errors.

His statement he could not see the crane coming when he leaned around the column after the first crane had passed may be true, as it might not have started; it had to travel 75 feet from the end of the runway to where appellee was working. But that he was prevented from seeing by a wall was certainly not correct, from the admitted physical facts. The wall was 25 feet away, on line with but not extending beyond the columns; the crane operated in a space 55 feet wide, at right angles to the columns, and had to travel some 75 feet to reach him. Undoubtedly this large moving object within this space could be seen, especially as part extended much below the runway. But there was evidence from which the jury might infer the crane could not be seen after it started. When appellee stood on the lattice-strut after the first crane passed, he raised one foot to the flange of the girder, which must have necessitated a reach of from one and a half to two feet; he then placed the other foot on top of the girder three and a half feet above him, causing a lift of five or six feet. To do this he swung his body to a horizontal position, holding on to the roof column, thence to the top of the girder or runway. The three-and-a-half-foot solid girder and six-inch rail, with his body in this position, would interfere with

his vision, and it would take but a brief space of time for the crane, running at three miles an hour, to reach the place where plaintiff first saw it, within 25 or 30 feet of the working place. How long it required him to execute this movement and place himself on top of the runway is not shown, but this length of time, compared with the time it took the crane to move the distance of 50 or 60 feet, was so short the court could not declare as a matter of law he was guilty of contributory negligence in failing to see the crane approach when he was climbing to the runway. As soon as he could see from this latter position, the crane was so close that, in his effort to escape, he was injured. A sudden emergency presented itself and he should not be held negligent though he might have done imprudent things thereafter. It was appellant's duty to give him a reasonably safe place in which to work, consistent with the circumstances, and, while cranemen do not ordinarily expect people on the runway, it appears from the evidence appellant was warned to look after these men and promised to do so. It could continue to operate the cranes, but, under the circumstances as testified, it must use reasonable care, considering the work the men were required to do. The case of *Lowry v. Baldwin Locomotive Works*, 253 Pa. 87, is not in point, as plaintiff in the case at bar had no other means provided to reach his working place.

The court admitted evidence of failure to observe the custom of sounding a warning to men on the runway or of placing a man on the lookout of the crane to notify them of its approach. It was not disputed there was a bell to warn men working on the floor below when the crane was used, but it nowhere appears in the evidence that men working on the runway required such notice; in fact they were rarely there,—the warning signal was not used for this purpose.

To establish negligence of defendant, through failure to observe a custom which applied to circumstances different from those where such precautions were neces-

sary, was improper, and the admission of such evidence was error. Plaintiff had a ground of negligence on which to plant his action. The admission of this testimony did not show defendant's method of operating the crane was the cause of the accident; nor did it appear the plants where the custom was supposed to exist were similarly located, with working conditions like those where this accident took place. A custom, to be good, should be certain, continued, reasonable, distinct, uncontradicted and so notorious as to be probably known to the parties to the contract: *Ambler v. Phillips*, 132 Pa. 167; *Adams v. Pittsburgh Insurance Co.*, 95 Pa. 348; *Corcoran v. Chess*, 131 Pa. 356.

A party charged with negligence disproves it by showing that the tools employed were those in general use or that the place in which to work was reasonably safe, but, to prove negligence, evidence of customary methods pursued in other like establishments is not admissible to make out plaintiff's case, except under extraordinary circumstances: *Chambers v. Mesta Machine Co.*, 251 Pa. 618, 623; *Cunningham v. Fort Pitt Bridge Works*, 197 Pa. 625, 630; *Clark v. Butler Junction Coal Co.*, 259 Pa. 262, 267. There is no proof in this case that it was the custom or usage for gongs to be rung or to have look-outs for men in unusual places, far above the working floor, in the path of the crane itself and not what might be suspended from it.

The third, fourth, fifth and sixth assignments of error are sustained and the judgment is reversed with a new venire.

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Syllabus—Assignment of Error.

Lawman's Estate.

Wills—Probate—Codicil—Proof of contents—Evidence—Act of June 7, 1917, P. L. 403.

1. Proof of a lost will or codicil is made out only by proof, by two witnesses, of execution and of contents, each of whom must separately depose to all the facts necessary to complete the chain of evidence, so that no link in it may depend on the credibility of one only.

2. The burden of proving a lost will or codicil is on the proponent, and in this case the proof of the execution of a codicil or will was met, but proof of its contents failed to meet the requirements of the act.

Argued October 11, 1921. Appeal, No. 78, Oct. T., 1921, by Mary E. Lawman, claimant as legatee, from decree of O. C. Allegheny Co., June T., 1919, No. 707, dismissing appeal from Register of Wills, in estate of Lenore Lawman, deceased. Before MOSCHZISKE, C. J., FRAZER, WALLING, KEPHART, SADLER and SCHAFFER, JJ. Affirmed.

Appeal from decision of register of wills refusing to admit to probate an alleged codicil. Before MILLER, P. J., and TRIMBLE, J.

The opinion of the Supreme Court states the facts.

Petition dismissed. Mary E. Lawman, claimant as legatee, appealed.

Error assigned, among others, was decree, quoting it.

Mary Elizabeth Lawman, P. P.

Thomas Patterson, of *Patterson, Crawford, Miller & Arensberg*, for appellee.

OPINION BY MR. JUSTICE SCHAEFFER, January 3, 1922:

Appellant, Mary E. Lawman, is a daughter of Lenore Lawman, deceased; her endeavor in this proceeding is to have probated an additional codicil to her mother's will, which codicil she claims has been lost or destroyed, by some one other than the decedent.

Impressed by appellant's faith in her cause, we have most carefully read and fully considered the entire record, but find ourselves unable, under the law as it is written and has been construed, to bring about the result she seeks.

The testamentary papers probated as the final disposition of her property by Lenore Lawman consist of a will and codicil, the former dated February 24, 1916, the latter March 6th of the same year. Appellant's contention is that, in addition to these two papers, there was a second codicil executed by decedent (later in date than the one probated), which substantially increased the gifts made to her.

In the court below, appellant produced testimony to establish the execution of the alleged codicil and its contents. It was proven to the satisfaction of the trial judge, whose language we quote, "beyond question, that a will or codicil other than that which has been probated was executed," but when it came to adducing testimony to show what its contents were, appellant failed to meet the requirement of the statute, by producing "two or more competent witnesses" to verify its terms. One witness testified that testatrix said "If I don't wake up Mollie will get my voucher" (a payment of \$325 a month made to testatrix under a trust) and "that she had left Mollie her voucher"; no other witness heard this statement. Another witness said testatrix told her "she had made her second will. . . . Mollie was well provided for. . . . could stop at any hotel or travel. . . . would be rich," that she had left "more to her than to the other sisters. . . . was well provided for." No witness corroborated this conversation. One of the subscribing wit-

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nesses to the lost or destroyed codicil was dead and the surviving one was ignorant of what it contained. Passing the question, whether the foregoing language, even if proven by two witnesses, would be sufficient to dispose of anything, we are compelled to hold the requirement of the statute as to the quantity of proof has not been met. The testimony of appellant herself, even if she is a competent witness (Fallon's Est., 214 Pa. 584), does not aid in meeting the measure.

We have very recently had occasion to consider the proof essential to the probate of lost testamentary papers; speaking through Mr. Justice KEPHART, in language most apposite to the pending case, we said (Hodgson's Est., 270 Pa. 210): "The attesting witnesses knew nothing of the contents of the will. . . . There is a fatal hiatus in the evidence which avoids bringing it within the Wills Act of April 8, 1833, P. L. 249, section 6, reenacted in section 2 of the Wills Act of June 7, 1917, P. L. 403, requiring the contents of a lost will to be proved by the oath or affirmation of two or more competent witnesses, otherwise the will shall have no effect. Under the act, to establish a lost will, there must be proof, by two witnesses, not only of due execution, but of the contents, substantially as set forth in the copy offered for probate. Proof of a lost will is made out only by proof of execution *and of contents* by two witnesses each of whom must separately depose to all the facts necessary to complete the chain of evidence, so that no link in it may depend on the credibility of but one. . . . When offered for probate, the will, or its substance, must measure up to the requirements fixed by laws: and here the legislature has laid its hand on the subject and directed the judicial course."

As the law is written, appellant fails to meet its requirements in her effort to prove the document she sets up; however we may sympathize with her in the situation with which she is confronted, it is our duty to administer the law as we find it.

The decree is affirmed at the cost of the estate.

B. V. D. Co., Appellant, v. Kaufmann & Baer Co.

Trade-mark—Unfair competition—Equity—Injunction—Pleading—Demurrer.

1. Anything done by a rival in the same business, by imitation or otherwise, designed or calculated to mislead the public in the belief that, in buying the product offered by him for sale, they were buying the product of another manufacturer, is unfair competition and in fraud of such other's rights, and will afford just ground for equitable interference.

2. A demurrer to a bill in equity should be ^{overruled} ~~sustained~~, where the bill avers that plaintiff was the owner of a trade-mark on underwear, that defendant in numerous instances when asked by customers for plaintiff's brand of underwear, had passed off other makes, and that these acts were for the sole and deliberate purpose to deceive and defraud the public as well as to cheat the complainant.

Argued Oct. 17, 1921. Appeal, No. 159, Oct. T., 1921, by plaintiff, from decree of C. P. Allegheny Co., Jan. T., 1921, No. 12, dismissing bill in equity, on demurrer, in case of B. V. D. Co. v. Kaufmann & Baer Co. Before FRAZER, WALLING, SIMPSON, KEPHART and SCHAFER, JJ. Reversed.

Bill in equity for injunction and accounting. Before SHAFER, P. J.

The opinion of the Supreme Court states the facts.

Bill dismissed. Plaintiff appealed.

Error assigned, inter alia, was decree, quoting it.

Joseph Stadtfeld, for appellant.—Under the Act of 1905 the sale and delivery by defendant of goods other than those of complainants on requests of orders for "B. V. D." garments was a violation of complainants' rights: *Portuondo Cigar Mfg. Co. v. Cigar Mfg. Co.*, 222 Pa. 116; *McLean v. Fleming*, 96 U. S. 245.

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The acts of defendant constitute unfair competition: Lawrence Mfg. Co. v. Mfg. Co., 138 U. S. 537; McLean v. Fleming, 96 U. S. 245; Saxlehner v. Siegel Cooper Co., 179 U. S. 42.

Under the case of Scranton Stove Works v. Clark, 255 Pa. 23, complainant is entitled to the relief prayed for.

Thomas Patterson, of Patterson, Crawford, Miller & Arensberg, with him Sachs & Caplan, for appellee.—The Pennsylvania trade-mark law has no application to this case.

The case at bar is squarely ruled by Scranton Stove Works v. Clark, 255 Pa. 23.

OPINION BY MR. JUSTICE KEPHART, January 3, 1922:

Plaintiff filed a bill in the court below to restrain unfair competition in the use of its trade-mark "B. V. D." in the sale of underwear. A demurrer to the bill was sustained, hence this appeal.

It is averred that the registered trade-mark, set in letters of white in a field of red, has been used by plaintiff for a long time in connection with the sale of their underwear, and defendant, without authority, is selling and offering for sale goods made by other houses as "B. V. D." underwear. A number of specific instances of such sales are given, in each of which a customer asked for "B. V. D." garments and defendant, representing it was selling that underwear, sold a suit made by another house, which, upon subsequent examination, bore some other label or mark; and that defendant sold a great number of garments, using the name "B. V. D." to deceive the public, delivering articles of other and different makes. All these acts, it is charged, were for the sole purpose and with the deliberate intention of defrauding the public and plaintiff.

Unfair competition has been defined by this court to be "anything done by a rival in the same business, by imitation or otherwise, designed or calculated to mis-

lead the public in the belief that, in buying the product offered by him for sale, they were buying the product of another manufacturer, is in fraud of that other's rights, and will afford just ground for equitable interference": Cigar Mfg. Co. v. Cigar Mfg. Co., 222 Pa. 116. Unfair competition, embracing an infringement of a trade-mark, may be said to be distinguishable in law from the latter in that it does not necessarily involve the question of the exclusive rights of another to the use of a name, symbol or device. The gist of the offense seems to be whether the act done tends to pass off the goods of one for those of another, or to deprive such other of his rights; and the basis of the action is fraud or deceit, misleading the public in the purchase of goods. It is not unlawful for a tradesman to imitate, manufacture and sell, as his own, an article manufactured by another, not covered by a patent, where the likeness is confined to the goods themselves and there is no attempt to deceive purchasers with respect to the manufacturer; there is no ground on which a court of equity can grant an injunction: Scranton Stove Works v. Clark, 255 Pa. 23. It is only by virtue of rights acquired under a trade-mark and the rules of law relating to unfair competition that complainant may institute an action; and the test, so far as the defendant is concerned, is whether the thing done was calculated to deceive an intending ordinary purchaser, not necessarily an intelligent one, in that the goods sold were not those of the manufacture called for. The true theory is the protection of the public, whose rights are infringed or jeopardized by confusion of the goods produced by unfair methods of trade,—as well as the owner's right to be protected from such methods. When a trade-marked article is asked for, the unlawfulness comes in the design to steal away another's business and divert custom from one manufacturer to another; complainant has the right to be protected in its reputation and the good will of the business designated and known by the use of the trade-mark.

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The charge of unfair dealing rests not only in the allegation that plaintiff's trade-marked garments were asked for and others of a different make were given, bearing a different label, but these acts were for the sole and deliberate purpose of deceiving and defrauding the public as well as cheating the complainant. It may be, as stated by the court below, that, when a "B. V. D." garment was asked for and the clerk threw a suit on the counter without comment, and it afterwards developed it was another manufacturer's make, such silence would not be an act speaking louder than words, more positive and emphatic, and not sufficient to sustain the charge of unfair competition; but to each of these allegations must be added the sweeping charge that these acts were done with the intention to cheat and defraud the public and the plaintiff, for the unlawfulness may come in the design or intent to steal away another's business, or a deliberate intention to unfairly divert custom from one manufacturer to another. Then there is the general allegation to which this language must be applied "that defendant has sold many thousands of garments, both over his own counter and by parcel post, using the name 'B. V. D.' to deceive the public and to increase the volume of its business and on all occasions delivering to the customer garments of other and different makes than those covered by the trade-mark of your orator." This is sufficient, with the specific allegations, to sustain the bill.

In *Scranton Stove Works v. Clark*, *supra*, the decree of the court below reads, "[forbidding] from selling or furnishing, in response to demands or inquiries for repair parts of any of such stoves or ranges, any repair part not made by the plaintiffs, whether having thereon plaintiffs' trade-marks or indicia or not, without distinctly informing the purchaser or purchasers thereof and indicating by marks placed upon such repair part or parts that the part or parts so furnished by the said defendants are not of the plaintiffs' manufacture." This

the court modified for the reason defendant was enjoined from manufacturing and selling repair parts it had the right to manufacture and sell as long as it did so without attempting to dispose of them as a part or thing manufactured by the plaintiff. The court below was in error when it enjoined these acts, and that case, while clearly recognizing the right to imitate, manufacture and sell, further recognized that an order was necessary to prevent the defendant from selling repair parts by representing them to be manufactured by the plaintiff, but so long as he made no such representation he was within his rights.

The bill contains substantial charges of unfair competition; whether the plaintiff may be able to prove the purpose of these sales as charged can only be developed by the evidence. The case is essentially one which should go to final hearing.

The order of the court below is reversed, the bill is reinstated, a procedendo awarded, costs to abide the determination of the case.

B. V. D. Co., Appellant, v. Frank & Seder Co.

OPINION BY MR. JUSTICE KEPHART, January 3, 1922:

For the reasons assigned in B. V. D. Co. v. Kaufmann & Baer Co., *supra*, the order of the court below is reversed, the bill is reinstated, a procedendo awarded, costs to abide the determination of the case.

B. V. D. Co., Appellant, v. Bondy.

OPINION BY MR. JUSTICE KEPHART, January 3, 1922:

For the reasons assigned in B. V. D. Co. v. Kaufmann & Baer Co., *supra*, the order of the court below is reversed, the bill is reinstated, a procedendo awarded, costs to abide the determination of the case.

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Syllabus.

Duff, Appellant, v. Hamlin.

Appeals—Assignments of error—Rule of Court 28—Distinct matters under one assignment—New trial—Reasons therefor.

1. Where appellant desires simply to raise the question of an alleged abuse of discretion by the court in refusing to grant a new trial, it is proper to set forth all the distinct reasons which accompanied the request for a new trial, in one assignment of error; but where appellant wishes to insist on the distinct reasons as showings of separate errors, each reason must be incorporated in a separate assignment and these assignments must show exceptions noted in the court below.

Mix v. North American, 209 Pa. 636, explained and distinguished.

Appeals—Assignments of error—Charge—Points and answers—Exceptions—Act of March 24, 1877, P. L. 38.

2. Request for instructions and answers thereto form part of the charge; and even where such requests are presented under the Act of March 24, 1877, P. L. 38, in writing, and the answers to the court are duly excepted to, unless there is a formal request made at the trial to reduce the charge to writing and file it of record, neither it nor the answers to points can be considered on appeal.

3. An assignment of error based on an answer made by the trial judge at the end of his charge, to an oral request for further instructions, will not be considered, where no request was made whatever that the charge, should be filed of record.

Appeals—Motion for judgment n. o. v.—Request for binding instructions—No general request to file charge, points and answers—Act of April 22, 1905, P. L. 286.

4. Under the specific provisions of the Act of April 22, 1905, P. L. 286, an assignment of error to the refusal of a motion for judgment n. o. v., based on a refusal of a written request for binding instructions, is proper, although the appellant had made no request whatever that the charge, points or answers should be filed of record.

Contract—Sale—Evidence—Parol evidence—Capacity of cars.

5. Where a seller of molasses states in a letter that he is carrying for the purchaser "100 tank cars" of molasses "for shipment in our cars," and plaintiff claims that his own cars held 5,000 gallons each, defendant may show, as measuring the amount of the purchase, that the usual tank cars contained 8,000 gallons, and

that cars of this capacity had been orally agreed upon between the parties.

Appeals—Amount of verdict—No loss shown to appellant.

6. Where, on an appeal by plaintiff from a judgment on a verdict in favor of himself in an action for goods delivered under a contract of sale, defendant sets up a breach of a second contract, the appellate court will not discuss questions relating to the second contract where the amount of the verdict in plaintiff's favor demonstrates that defendant received no allowance on the second contract.

Argued October 11, 1921. Appeal, No. 79, Oct. T., 1921, by plaintiff, from judgment of C. P. Allegheny Co., July T., 1917, No. 1723, on verdict for defendant, in case of R. P. Duff, trading as P. Duff & Sons, v. Dwight E. Hamlin. Before MOSCHZISKE, C. J., FRAZER, WALLING, KEPHART, SADLER and SCHAFER, JJ. Affirmed.

Assumpsit for goods sold and delivered. Before CARNAHAN, J.

The opinion of the Supreme Court states the facts.

Verdict and judgment for defendant for \$4,000. Plaintiff appealed.

Errors assigned were as follows: (1) in overruling plaintiff's motion for judgment n. o. v., quoting the record; (2) in overruling plaintiff's motion for a new trial for seven different reasons, quoting the record; (3) in portions of the charge to the jury, quoting the request to charge and exception.

The reasons for the new trial were as follows, as quoted in the 2d assignment of error:

1. The verdict is against the evidence.
2. The verdict is against the weight of the evidence.
3. The learned court erred in the admission of verbal testimony when the communications had been reduced to writing.
4. The learned court erred in the admission of a letter from plaintiff to a third party written months after the

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expiration date of the contract between plaintiff and defendant.

5. The learned court erred in his charge to the jury as to the amount that might be recovered by the plaintiff.

6. The learned court erred in his charge to the jury with reference to the actions of the parties amounting to a variation of the terms of the written contract between the parties.

7. The plaintiff asks leave to file additional reasons after the testimony taken in the case has been transcribed.

Robert D. Dalzell, of Dalzell, Fisher & Dalzell, for appellant.—There was no question to be submitted to a jury: *Ogden v. Traction Co.*, 202 Pa. 480; *Thompson v. Schoch*, 254 Pa. 585; *American Dressler Tunnel Kilns v. Holt*, 269 Pa. 293; *Atchinson v. Board of Publication*, 266 Pa. 47; *Lenox Coal Co. v. Coal Co.*, 265 Pa. 572; *Tustin v. Reading Coal & Iron Co.*, 250 Pa. 425.

Ernest C. Irwin, with him A. L. Petty and Watson & Freeman, for appellee.

OPINION BY MR. CHIEF JUSTICE MOSCHZISKEB, January 3, 1922:

Plaintiff, R. P. Duff, trading as P. Duff & Sons, brought suit against Dwight E. Hamlin, to recover for goods sold and delivered to him. Defendant admitted receipt of the goods, but claimed a set-off, which the jury allowed in part; judgment was entered, accordingly, in the sum of \$4,000, and plaintiff has appealed.

Appellant claims that, in the summer and fall of 1915, he sold and delivered to defendant some eight tank cars of molasses, which, by mistake, were billed at the rate of six cents a gallon, whereas the price should have been sixteen cents; also that he subsequently sold and delivered to defendant further quantities of molasses, at the rate of twenty cents a gallon, the difference in price

of the first goods and the total price of those subsequently delivered amounting in all to between \$9,000 and \$10,000. To this claim defendant replied that, while he had received the goods in question, the six cents a gallon paid by him for the eight cars was the contract price agreed on; further, that plaintiff owed him, defendant, more than \$50,000 damages which he had suffered by being obliged to go into the market and purchase molasses at advanced prices, in consequence of plaintiff's failure to make deliveries according to the contract of sale.

The written agreement between the parties consists of a letter, dated March 13, 1915, from plaintiff to defendant, the material parts of which are as follows: "We are covering you for 100 tank cars of Blackstrap for shipment in our cars from Apr. 10th, 1915, until Jan. 1st, 1916, at 6c per gallon.....[here follows an explanation that plaintiff is getting the molasses, called Blackstrap, from another concern, as to whose responsibility he is not sure; after which the letter continues:] Therefore, in view of the fact that we are making this contract for your benefit and in doing so saving you 1/2c per gallon, we must make it conditional on our principals carrying out their contract in good faith with us and delivering these 100 tank cars of Molasses.....We are working on a slender commission, [on] a contract that is much more profitable to you than it is to us, and..... we do not like to assume the responsibility of filling this contract if the people whom we are acting under shall fail to execute the contract in full."

The construction of the agreement which plaintiff contends for is, that he was obliged to give defendant, at the price named, only so much of the molasses thus sold as might be delivered to him, plaintiff, by the Sugar Products Company of New York (who, concededly, was the third party referred to in the above-quoted letter) up to Jan. 1, 1916, and that, according to an agreement between plaintiff and defendant, all molasses delivered to

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the latter after that date was to be paid for by him at current market prices.

On the other hand, defendant contends there is nothing in the written contract to indicate time as its essence,—that, taking it as a whole, the writing rather suggests the delivery of the 100 tank cars, at the stated price, to be the material object in view, so far as delivery to plaintiff from the party furnishing the goods would permit; further, that, however the original writing might be read, the parties thereto had orally agreed, subsequent to January 1, 1916, that plaintiff should purchase and deliver to defendant (so that the latter might carry on his business) molasses other than that contracted for in the original writing, for which defendant would pay plaintiff current market prices, with a usual commission, it being then agreed that “any molasses which the Sugar Products Company might thereafter deliver to plaintiff, at any time, under its contract, should be turned over to defendant at his contract price of 6c per gallon.”

Defendant claimed plaintiff delivered to him only 79 tank cars of molasses at six cents a gallon, although the Sugar Products Company had made deliveries to plaintiff of molasses in considerable quantities, which should have been forthwith sent to him, defendant, and that plaintiff's failure to send on this last-mentioned molasses, at the contract price of six cents, caused him, defendant, to suffer heavy damages, for which he asked a certificate.

To all of this plaintiff replied, first, that the writing entitled defendant only to such molasses, at the contract price, as he, plaintiff, might obtain from the Sugar Products Company up to January 1, 1916, and that there was no agreement between them extending that date; furthermore, that the writing stipulated cars of the capacity used by plaintiff, which carried 5,000 gallons each, whereas many of the cars delivered to defendant contained 8,000 gallons each, therefore defendant had in

fact received all of the molasses contracted for, and a little more.

Defendant answered that the writing means, so far as measuring the amount of the purchase is concerned, cars of the usual tank capacity, namely 8,000 gallons each, and that this was orally agreed between the parties.

Defendant presented evidence to prove the oral agreement just referred to, and he points to the writing itself to show that plaintiff there says that he is covering the defendant for "100 tank cars" of molasses, adding "for shipment in our cars," apparently thereby drawing a distinction between the "tank cars" first named and "our cars" last referred to, and that, later in the same letter, the writer makes reference to "these 100 tank cars," which the Sugar Products Company were to deliver to him, without saying anything about their dimensions or suggesting they should be of the smaller capacity which plaintiff now claims for his own cars. Under the circumstances, we cannot hold that error was committed in receiving testimony as to the real understanding between the parties concerning the capacity of the "100 tank cars" of molasses, referred to in the letter as "covered," or purchased, by plaintiff for defendant.

All of the issues which we have indicated were presented to the jury, and, as before said, were found against plaintiff. Defendant, in his pleadings, set up the breach of another contract by plaintiff, concerning the purchase of 50 cars of molasses at seven cents a gallon; but, since the verdict rendered shows, by the great discount the jury made in defendant's claim of damages, that he received no allowance on this second contract, it is not necessary to discuss it.

Appellant has three assignments of error, only one of which calls for consideration, and that is the first, complaining because the court below refused to enter judgment in favor of plaintiff, notwithstanding the verdict for defendant. As to this, we need only say that, after

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reading the testimony, we are not convinced that any of the controlling issues involved could properly have been decided as matters of law in favor of plaintiff; hence he was not harmed by the fact that they were submitted to the jury. The manner of their submission, which is complained of in the two remaining assignments of error, is not properly raised; for the first of these last two assignments simply complains of the refusal to grant a new trial, embracing in this complaint seven different reasons assigned in the court below, and this without showing specific objections made and exceptions entered at the time the rulings and instructions now sought to be questioned were made. The practice thus attempted cannot be permitted; it offends several principles of appellate practice: see *Maculuso v. Humboldt Fire Ins. Co.*, 271 Pa. 489, and authorities there cited. Rule 26 of the Supreme Court expressly provides that "each error relied on must be specified particularly and by itself"; further, that "if any specification embrace more than one point or refer to more than one bill of exceptions or raise more than one distinct question, it shall be considered a waiver of all the errors so alleged." In *Mix v. North American*, 209 Pa. 636, 641, we held that an assignment of error which complained of a refusal to grant a new trial was not vitally defective in setting forth four distinct reasons why such relief should have been granted, saying, the single error alleged by the assignment was the denial of the new trial and all of the reasons simply raised the question of an alleged abuse of discretion in this regard. That case, however, is not an authority that four distinct and disassociated matters can be brought before the appellate court in a single assignment (particularly where the single assignment fails to show the objections and exceptions taken in the court below regarding each of the alleged errors, as in the case now before us); for, if it were, it would be a complete reversal of the above-quoted rule. It is still the law that, when counsel desire to question a ruling on the evidence,

or the manner in which a case is submitted to the jury, or other trial points which in themselves are the subject of specific objection and exception, such points must be incorporated in separate assignments of error for purposes of review.

The last of the two assignments now under discussion complains of an answer made by the trial judge at the end of his charge to the jury, to an oral request for further instructions. We recently held, in *Ward v. Bab-bitt*, 270 Pa. 370, that points and answers thereto form part of the charge, and that, even when such points were presented, under the Act of March 24, 1877, P. L. 38, in writing, and the answers of the court were duly ex-cepted to, unless there was a formal request made at the trial to reduce the charge to writing and file it of record, neither it nor the answers to points could be reviewed on appeal, our ruling being that the Act of 1877 had to be construed with other legislation, in *pari materia*, and, when thus read, it meant that answers to points were subject to review only when filed in connection with the charge, in the manner re-quired by law,—that is, on request at the end of the trial; for, if this were not the rule, we might on appeal have points and answers before us without the charge as a whole, and, in the absence of the latter, we would not be in a position to judge properly concerning the cor-rectness of the former, for, as may be realized, the points might be refused without reading, because fully an-swered in the general charge, which is often the case. These rules are not mere arbitrary regulations to make practice more difficult, as some seem to think, but repre-sent arrangements which add materially to the orderly and efficient conduct of the business of the courts.

Here appellant made no request whatever that the charge, points or answers thereto should be filed of record, and, hence, we shall not formally pass upon their sufficiency; but we take occasion to say that, were they properly before us, there is nothing in them which calls

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for reversal of the present judgment. We also note that plaintiff's written point for binding instructions, upon the refusal of which he rests his first assignment of error, is in a different position from points generally, owing to the specific provisions of the Act of April 22, 1905, P. L. 286; see *Keck v. Pittsburgh, H., B. & N. C. Ry. Co.*, 271 Pa. 479, and *Mooney v. Kinder*, 271 Pa. 485.

The first assignment of error is overruled; the second and third are dismissed.

The judgment is affirmed.

**Scorsoni v. Pittsburgh Provision & Packing Co.,
Appellant.**

Negligence—Automobiles—Collision—Car driven by minor son without license.

1. In an action to recover damages for death of plaintiff's husband in a collision between two autotrucks, where it appears that the decedent's truck was driven at the time by his son, an experienced driver under eighteen years of age without a license, the case is for the jury on the conflicting evidence as to the cause of the accident; and binding instructions for defendant on the ground that the deceased was guilty of contributory negligence in permitting his son to drive the truck, are properly refused.

2. In such case, the minority of the son had no causal relation to the accident.

Argued October 13, 1921. Appeal, No. 131, Oct. T., 1921, by defendant, from judgment of C. P. Allegheny Co., Jan. T., 1920, No. 1401, on verdict for plaintiff, in case of *Louisa Scorsoni v. Pittsburgh Provision & Packing Co.* Before FRAZER, WALLING, SIMPSON, SADLER and SCHAFFER, JJ. Affirmed.

Trespass for death of plaintiff's husband.

The opinion of the Supreme Court states the facts.

Verdict and judgment for plaintiff for \$2,760. Defendant appealed.

Assignment of Error—Opinion of the Court. [272 Pa.

Error assigned, inter alia, was refusal of judgment for defendant n. o. v., quoting record.

J. Roy Dickie, of *Wishart & Dickie*, for appellant.

Oliver K. Eaton, with him *W. H. Coleman*, for appellee.

PER CURIAM, January 3, 1922:

Plaintiff's husband, while riding on the Lincoln Highway near the City of Pittsburgh on a truck operated by their minor son, an employee of Jordan Brothers, was injured as a result of a collision with a truck of defendant's, and died a few hours later. The evidence as to the cause of the collision was conflicting, each driver claiming the accident was the result of negligence on the part of the other. At the conclusion of the testimony defendant asked for binding instructions in its favor, assigning, as a reason in support of the motion, that deceased himself was chargeable with negligence in riding in the truck driven by his son, a minor under the age of eighteen years, who had failed to obtain a driver's license as required by section 4, Act of April 27, 1909, P. L. 265. The court below refused the motion and submitted to the jury the question of negligence on the part of the drivers of the two trucks, as well as that of deceased, if any, for failure to take precaution to avoid the accident. A verdict was rendered for plaintiff and defendant appealed.

The verdict establishes that the collision was due to negligence on the part of defendant's driver and absolves both plaintiff's son and her husband from, in any manner, contributing to the accident, unless the act of the husband in permitting his minor son, an experienced driver but under eighteen years of age, to operate the truck, charged him with negligence. The minority of plaintiff's son had no causal relation to the accident (*McIlhenny v. Baker*, 63 Pa. Superior Ct. 385) and the questions of negligence and contributory negligence, hav-

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ing been fairly submitted to the jury, the assignments of error are overruled and the judgment affirmed.

Callery's Appeal.

Taxation—Personal property tax—Corporations—Tax on capital stock—Foreign corporations—Holding companies—Registration—Doing business—Words and phrases—Tangible assets—Assessment by auditor general—Act of June 17, 1913, P. L. 507, and July 15, 1919, P. L. 948—Failure to make return—Penalty—Remission.

1. The shares of stock of a foreign corporation owned by a resident of Pennsylvania is subject to the personal property tax for county purposes under the Act of June 17, 1913, P. L. 507, where it appears that although the corporation is registered to do business in the State, it has no tangible property there subject to the capital stock tax under the Act of July 15, 1919, P. L. 948.

2. In such case it is immaterial that the corporation owns the entire capital stock of another corporation which has extensive holdings of property in this State, and is engaged extensively in business herein; the shares of stock of the subsidiary company are not tangible assets.

3. Nor is it material that the auditor general has assessed and such foreign corporation has paid the capital stock tax under the Act of July 15, 1919, P. L. 948, if it appears that the corporation was, in fact, not liable for such tax. The auditor general's report in such case is not conclusive upon the county authorities.

4. Value, for purposes of capital stock taxation, comes through property, and if the corporation is doing business here, with no property or capital located or used in the Commonwealth assessable for state purposes, its stock has no value upon which a capital stock tax may be based.

5. Registration in the nature of a license, or a right to do business, has no taxable value.

6. Acts in conformity to, and in furtherance of, the sole business purposes of a going concern, represent "doing business," but such acts alone do not constitute "doing business in and liable to taxation," within the meaning of the statute.

7. To justify the imposition of a tax without a statute plainly warranting it, it is not enough to show that the absence of a tax works an injustice in permitting many persons to escape taxation.

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8. A personal property tax is a personal levy against resident holders, computed on the value of shares of stock owned by them, not taxable for state purposes or exempt under state laws.

9. Corporate tax is a levy by the State against the capital stock as its value is computed from the assets, less such as are nontaxable, exempt, or on which a state tax has been paid.

10. A corporation does not lose its corporate identity when its stock is all owned by another corporation.

11. Where a holding company is a shareholder of a subsidiary company, it stands in the same relation to that company as any individual owner of stock, but the legal relations of the two companies, qua companies, are entirely different, as must be the rights of their stockholders.

12. Where a citizen fails to make a return of personal property through an honest misconception of the law relative to the taxing statutes, the courts have no power to relieve him from the penalty of 50 per cent for the failure, but the board of revision should do so.

Justices FRAZER, SADLER and SCHAFER dissent.

Argued October 20, 1921. Appeal, No. 151, Oct. T., 1921, by Percy F. Smith et al., constituting the Board of the Assessment and Revision of Taxes, from order of C. P. Allegheny Co., July T., 1921, Docket B., No. 1178, sustaining appeal from tax assessment, in re Appeal of James D. Callery from assessment of personal property for taxation. Before MOSCHZISKE, C. J., FRAZER, WALLING, SIMPSON, KEPHART, SADLER and SCHAFER, JJ. Reversed.

Appeal from tax assessment. Before SHAFER, P. J.
The opinion of the Supreme Court states the case.

Appeal sustained. Percy F. Smith et al., Board of Revision of Taxes, appealed.

Error assigned was order, quoting it.

John C. Bane, with him *Oscar T. Taylor*, County Solicitor, and *Wm. C. Jacob*, Assistant County Solicitor, for appellants.—The situs of intangible personal

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property for taxation is the domicile of the owner: *Com. v. Curtis Pub. Co.*, 237 Pa. 333, 335; *Com. v. Buffalo & Lake Erie Tr. Co.*, 233 Pa. 79, 80-2. And the domicile of a corporation is the state of its origin: *Com. v. Standard Oil Co.*, 101 Pa. 119, 146.

The right of Allegheny County to assess and collect the tax in controversy here arises out of the Act of 1913. The "principal purpose" of that act "is to give the tax to the counties instead of, as theretofore, having it collected as a state tax and part of it paid to the counties": *Provident Life & Trust Co. v. Klemmer*, 257 Pa. 91, 100.

The precise question involved here does not seem to have been involved in any preceding case; but many principles stated in former cases are directly applicable here: *Dupuy v. Johns*, 261 Pa. 40, 45-6; *Com. v. Coal Co.*, 156 Pa. 488; *Com. v. Furnace Co.*, 268 Pa. 283.

David A. Reed, of Reed, Smith, Shaw & Beal, for appellee, cited: *Com. v. R. R.*, 251 Pa. 6; *Com. v. Westinghouse Air Brake Co.*, 251 Pa. 12.

OPINION BY MR. JUSTICE KEPHART, January 3, 1922:

This is an appeal from the Common Pleas of Allegheny County, striking off a personal property tax levy. It was stated at argument that the lower court's action affects tax revenues amounting to \$1,250,000 heretofore received by the county, and ultimately determines the county's right to impose this tax on property valued at half a billion dollars. We mention this to indicate the far-reaching effect of the conclusion we may make in the present case.

To justify the imposition of a tax without a statute plainly warranting it, it is not enough to show that the absence of a tax works an injustice in permitting many persons to escape. The taxing power lies with the legislature, and a survey of our taxing enactments evidences a policy to tax residents on their investments in corporations, either personally or through the cor-

poration. Many exemptions exist, some based on a supposed greater benefit to the State; but, through all their various forms, the predominating policy runs to cause the citizen so investing capital to bear a fair share of the cost of maintaining the government, and he who seeks to be excused must bring himself within the class of exempt persons.

It is impossible to always attain absolute equality within the same class of taxable subjects, but, having in view the state's paramount purpose, with the legislative will before them, courts must not, by astute efforts, block the intendments of the Commonwealth and frustrate a policy that has for its foundation peace and good will among our citizens, based on equality. On the other hand, courts should not be assiduous to burden those who, through energy, thrift, ability and resourcefulness, have acquired an abundance of the subjects of taxation, simply because they are in this fortunate position.

The present appeal is not an endeavor to evade taxation, but one which earnestly and fairly raises questions affecting our taxing laws and the true meaning of their various interpretations heretofore made by this court. If other residents, in the same position, with appellee's view as to the law, have not been taxed, still more than this appellee, and others in like position who in the past have paid the tax now disputed, should not be required to continue such payments if the assessment is not authorized by law.

The County of Allegheny has for some time assessed and collected what is commonly called a personal property tax, under the Act of June 17, 1913, P. L. 507, against resident holders of shares of stock of foreign corporations, and for the year in question assessed against appellee a tax of four mills on \$400,000, the value of 2,444 shares of stock of the Gulf Oil Corporation.

Appellee, a taxpayer, took an appeal from the board of revision, which the court below sustained, relieving

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him from payment of the tax in question, for the reason that the Gulf Oil Corporation, itself, was liable to a tax, and, even if it was not, the action of the auditor general determining that it was so liable was conclusive on the court. The county takes this appeal.

The Gulf Refining Company is a Texas corporation, hereinafter termed "subsidiary," incorporated for the purpose of the production and manufacture of petroleum. It does business in the United States, Mexico and elsewhere. Later, the Gulf Oil Corporation, hereinafter termed "holding company," was formed. It was incorporated under the laws of New Jersey for the purpose of "holding the stocks of subsidiary companies engaged in the business of producing, transporting, manufacturing and marketing petroleum and petroleum products." Holding company acquired all the stock of subsidiary and was recently registered in Pennsylvania; it filed a consolidated report in the office of the auditor general and paid a capital stock tax of \$11,774.10 on approximately \$2,250,000, and a loan tax for the year 1920. Both these taxes had been heretofore paid by subsidiary. Holding company has an authorized stock issue of \$60,000,000, of which \$36,000,000 is outstanding, the whole issue valued in round numbers at \$59,900,000.

All tangible property, real and personal, is owned by the subsidiary in its own name; it is a going concern, functioning through its own charter powers. The holding company does not own any tangible property in Pennsylvania, and from its report we find its intangible assets amount approximately to \$113,000,000, made up of stock of foreign corporations, United States securities, bonds, advances to corporations, cash in bank, notes and accounts receivable and other miscellaneous assets. Board meetings are held, money deposited, dividends and interest paid, and all its officers reside here, the company occupying several floors of an office building in Pittsburgh.

A personal property tax is a personal levy against resident holders, computed on the value of shares of stock owned by them, not taxable for state purposes or exempt under state laws; and, in this case, the shares are taxable unless the corporation issuing them is liable for a capital stock tax or is relieved from payment by state laws.

Corporate tax is a levy by the State against the capital stock, as its value is computed from the assets, less such as are nontaxable, exempt or on which a state tax has been paid. Corporations are liable for such tax under the Act of June 8, 1891, P. L. 228, 235, section 4, as amended by the Act of June 8, 1893, P. L. 353, 354, section 1, and by the Act of July 15, 1919, P. L. 948, section 1. A tax of five mills may be levied on the value of the capital stock on all corporations, domestic and foreign, doing business, and liable to taxation, or having capital employed, or used, in this Commonwealth in any manner whatsoever.

The holding company is not incorporated as an operating company for producing, distributing, manufacturing and marketing of petroleum products, but is empowered to hold the stock of such companies, and if, in the light of some decisions of this court, we accept as conclusive the charter powers as being the only source or basis upon which a tax may be founded, we might dismiss this immediate subject by holding the Gulf Oil had no authority to function either in an executive or operating capacity as a manufacturer or vendor of petroleum products. But, apart from this, and conceding for the moment its right to actively engage in manufacturing petroleum products, was it, through its executive officers, doing a business that made it liable to a tax, or did it have property employed or used in the Commonwealth? Property employed or used refers, generally, to leasing or some such method of use: *Com. v. National Cash Register Co.*, 271 Pa. 406.

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It is contended holding company managed, supervised and controlled the various activities of subsidiary; that, as it was the executive directing energy, through its many instrumentalities, it carried on the work of the refining company; and, on the theory that the law regards the substance and not the form, through holding company's sole ownership of all subsidiary's stock, such ownership drew to it the physical property of subsidiary; and that, with the screen of corporate existence thrust aside, the holding company was in fact the owner of subsidiary's property, doing business and liable for a tax within the meaning of our tax statutes.

Let us examine the question a little more closely. Holding company is a distinct, corporate entity, as is also subsidiary. The latter has power to manufacture and sell, with all the incidental rights necessary to the prosecution of the business. Holding company, as its sole stockholder, controls subsidiary; but, to do so, it must use the rights and powers of the latter. Holding company has no authority to sell oil; but, through its officers, acting as officers of the refining company, or compelling the latter's officers to obey, it imposes its will on subsidiary. Holding company does this, however, only as sole shareholder; it could impose no liability or legal obligation on the subsidiary except as the individuals who acted were brought somewhere within the limits of the latter's functioning body. The directors of the two companies may be identical, but this would not alter the situation.

The Gulf Refining Company, the subsidiary, is the living, operating business organization, with charter powers to so act. It is this company that comes in touch with the great commercial world, from Mexico to Canada; it handles the mammoth production which gives substance to the enterprise. It is this company that directly bears the result of all acts, good or bad, in relation to or connected with the business of producing and transporting, manufacturing and marketing petroleum

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and petroleum products. The sole shareholder can lawfully impose its will on Gulf Refining and enforce obedience through the latter's machinery, created by law to govern it. Gulf Oil, eo nomine, could not replevin a wheelbarrow of Refining Company, nor could it, eo nomine, execute a mortgage on the latter's property. Holding company's control does not sweep aside the corporate existence of Refining Company; the corporations are just as separate and distinct as though the sole shareholder did not exist. Gulf Oil, as sole shareholder, receives all net profits of the subsidiary company through dividends or other arrangements. Their dealing, because of share ownership, may assume various closely related forms; and, as no outstanding holder is prejudiced through such acts, there is no one to complain. The corporate lines are distinct, and we see no reason why it is not only legally right but wise to keep them so; for, while it may avail the owners of stock, in the present instance, to wipe them out, later, and, in matters of more serious import, when their interests may dictate a different attitude, it might prove disastrous to them in the extreme. A corporation does not lose its corporate identity when its stock is all owned by another corporation: *Bridge Co. v. Traction Co.*, 196 Pa. 25, 28.

But it is urged the Westinghouse Case (251 Pa. 12) controls. There we decided that, where a domestic company was actually engaged in manufacturing business within the State, and, in order to conduct advantageously certain minor enterprises, ancillary to its main business, the property of which enterprises it already owned, it incorporated companies outside the State (which assumed control of the business in question for the domestic corporation), we would consider, for taxing purposes, the property of these foreign companies as belonging to the domestic concern; and, as thus situated, we held such property could not be taxed. There the outside enterprises were but a small part of a

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large body; but here we have a subsidiary company operating under charter powers, greater than and different from the powers of the holding company, and in no way subordinate to it,—with the former exercising the powers the latter says, mistakenly, it has and exercises. Under such circumstances, the subsidiary does not cease to exist, nor are its powers and property joined with those of the holding company, even for convenient taxation; although this may be done by consolidation or merger. It is not our purpose to extend the Westinghouse decision beyond the letter of its terms. See *Com. v. Shenango Furnace Co.*, 268 Pa. 283.

Does *Dupuy v. Johns*, 261 Pa. 40, control? There the Crucible Steel Company, a foreign corporation, invested capital in Pennsylvania, the largest part in manufacturing, the remainder not so engaged. We held that the corporation was liable for a capital stock tax, and its resident shareholders were wholly relieved of liability for personal property tax. Here the subsidiary, Gulf Refining, a foreign corporation, has part of its capital engaged in Pennsylvania, part in manufacturing petroleum and the residue is not so engaged. It is liable for taxation on that part of its capital employed here and not engaged in manufacturing; and its resident shareholders are not liable for a personal property tax. Up to this point the cases are parallel; from this point the additional facts present a very different situation.

So far, the resident shareholder in each company deals directly with his corporation; but another corporation (holding company) appears, with a different set of shareholders, and these claim that, because their company owns all the shares of Gulf Refining, liable to taxation, they have the same right to be relieved from personal property tax as the shareholders of the subsidiary. To reach this position, however, their holdings must be viewed by our taxing statutes through two distinct corporations; whereas the separate rights of a

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shareholder must come through the corporation which issues to him his shares, and, if the source of the existence of such shares is not doing business and liable to taxation, then the shareholder's right to immunity is never gained.

In ascertaining the liability of the holding company to capital stock tax, different principles of law are involved. We must, in viewing it, eliminate actual ownership of tangible property and engagement in business as a manufacturer; for it had none of the first and did not enter upon the second. Was the holding company's stock otherwise taxable?

This company, an independent entity, with its domicile in New Jersey, used in Pennsylvania capital contributed by its shareholders in the purchase of stock of Gulf Refining, a Texas corporation; which stock it here holds on deposit in safety vaults. The use of capital by a foreign corporation in purchasing stock of a Pennsylvania corporation is not the subjection by the purchasing company of so much capital to doing business in Pennsylvania (*Com. v. Standard Oil Co.*, 101 Pa. 119, 149; *Com. v. Curtis Publishing Co.*, 237 Pa. 333, 337); this is likewise true if the purchase is here made of stock of a foreign corporation doing business in Pennsylvania. In purchasing, the capital is transferred to the selling company; it is that company which uses or employs it in Pennsylvania or elsewhere as it sees fit: *Construction Co. v. Winton*, 208 Pa. 467, 472. The thing here purchased was not, and is not now, in Pennsylvania; and the same is true of shares bought from shareholders.

We may illustrate what might happen if the law were to the contrary. Resident shareholders of a foreign corporation, not liable to state tax, must return and settle for a personal property tax. Suppose such company, with a large list of such holders, here liable to this tax, purchases ten shares in a domestic concern liable to a tax. After registration, would this purchase constitute

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the "employment of capital or doing business, and liable for taxation" contemplated by the act, so as to relieve resident shareholders? It does not need much discussion to demonstrate the gross frauds that could, and probably would, be practiced if the law answered in the affirmative the proposition just put; which, of course, it does not. If ten shares will not accomplish the result, will one-third, one-half or all? Such transactions do not constitute "doing business, and liable to taxation"; nor is property or capital employed or used therein within the meaning of the law.

To what extent do the benefits of the thing bought pass on to the shareholders of the purchasing corporation? The shareholders of the two companies do not stand in the same relation to subsidiary's property or capital employed. Holding company, a corporate entity, is a shareholder of subsidiary, standing in the same relation to that company as any individual owner of stock; but the legal relations between the two companies, qua companies, are entirely different, as must be the rights of their stockholders. The thing purchased is shares of stock. In both instances the rights of the separate shareholders in their respective companies are determined by the law of New Jersey (*McCloskey v. Snowden*, 212 Pa. 249, 254; *Kinney v. Mexican Plantation Co.*, 233 Pa. 232, 233), where the company was created and where the intangible property of each is properly taxable: *Com. v. Curtis Publishing Co.*, 237 Pa. 333, 335. A corporation owns its property; the stockholder has no right to it or any part of it, and its special benefit (tax free) does not pass to him, any more than would the right to make a patented article, which the company manufactured under a license. When distributed in dividends he is entitled to his share; holding company's shareholders do not receive the dividend as shareholders of subsidiary, nor could they force a redistribution of the dividend so received; a personal property tax is not intended to reach the property of a corporation. There

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is no connection under the law between the different sets of stockholders; each must work out his rights through his own company, and the rights of one do not pass to the other, under circumstances as here related.

The assets (shares of stock) so purchased, are not, as such, liable to a state tax. They are incorporeal, intangible things connected with a foreign corporation, which are not within the taxing jurisdiction of the State, the ownership of such property being referred to the state of its domicile,—its situs is there (Com. v. Standard Oil Co., 101 Pa. 119, 146; Neiler & Warren v. Kelley, 69 Pa. 403, 407; Com. v. Curtis Publishing Co., *supra*; Com. v. Traction Co., 233 Pa. 79, 80, 82), though the foreign corporation may be employing capital in Pennsylvania subject to tax. What is here said applies to all intangible assets of Gulf Oil, the holding company.

If Gulf Oil were a domestic corporation, owning *intangible* assets located in another state, Pennsylvania would be the taxable domicile of such assets: Com. v. Semet-Solvay Co., 262 Pa. 234, 236. Or if both Gulf Oil and Gulf Refining were domestic corporations, under the state of facts here presented, it would, when settling the capital stock tax of the former, or holding company, be liable for the fractional or proportionate part of the value of its subsidiary's shares, untaxed in Pennsylvania, as such fractional part adds value to the capital stock to be taxed. Though such intrinsic value of shares may be out of the state (Com. v. Shenango Furnace Co., *supra*), shares of a corporation, held by a domestic corporation, are not taxed under a personal property tax. The Act of 1913 does not make such ownership taxable (see Com. v. Lehigh Coal & Navigation Co., 162 Pa. 603, on earlier legislation), but the value of the stock thus held adds to the general value of the capital stock of the holding corporation, to be deducted as the whole or part pays a state tax; but, in personal property levies, the tax is computed on the value of the shares, *qua* shares,

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and the Act of 1913 does not contemplate a fractional division of such value: *Dupuy v. Johns*, *supra*.

A corporation becomes liable for a capital stock tax when its stock has value through its assets to make it liable; it is on that value the tax is computed: *Dupuy v. Johns*, 261 Pa. 40, 45; *Com. v. McGlinn Distilling Co.*, 265 Pa. 346, 350. Value, for purposes of capital stock taxation, comes through property, and if the corporation in question is doing business here, with no property or capital located or used in the Commonwealth assessable for state purposes, its stock has no value upon which a capital stock tax may be based.

Registration in the nature of a license, or a right to do business, has no taxable value; nonregistration simply renders a foreign corporation's acts unlawful, and registration, without more, does not cause the corporation to become liable for a state tax.

When we look for the value of Gulf Oil stock we find intangible assets, beyond our taxing jurisdiction. The best evidence of this is the company's report, where all intangibles are treated as extraterritorial. If this is the home of Gulf Oil for some purposes, as urged, the report shows the officers do not regard it as such for taxation. While these facts do not influence our decision of the main question, they show how Gulf Oil regards its intangible assets.

As the business, relating to charter purposes, of the company "holding the stock of subsidiaries," was conducted in Pittsburgh, where its board of directors met, this, it is urged, is doing business liable to taxation, though the holding company owned no property in the State.

Acts in conformity to, and in furtherance of, the sole business purposes of a going concern undoubtedly represent "doing business"; but such acts alone do not constitute "doing business in and liable to taxation," the situation which our taxing statute requires, and through which appellee bases his contentions as to the

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nontaxability of his shares here in question. The act recognizes a distinction between doing business that requires registration to bring a company within reach of legal process or that will require filing a loan report, and doing business in and liable to taxation (capital stock tax). Herein the Hazelton-Wilkes-Barre Case (251 Pa. 6) is parallel; under its facts that company would not be liable for a capital stock tax. We held it was doing business within the State and liable, under the Act of 1885, to make a report of corporate loans. It is somewhat like Colonial Trust Co. v. Montello Brick Works, 172 Fed. 310, and Washington-Virginian Ry. v. Real Estate Trust Co., 238 U. S. 185, where the registration was required with no tangible property to tax. Attention is directed to the Act of 1919 on the subject of loan tax. The Gulf Oil is in like situation, doing business within the meaning of the loan report and registration act, while its capital stock is not liable to a state tax through lack of taxable value.

It follows that a mere holding company, chartered in another state solely for the purpose of "holding the stock of subsidiary companies," as the Gulf Oil Corporation is, can have no property in this State which is "liable to taxation," under our laws relating to the capital stock tax, and hence such a tax cannot be properly levied against it, though it may have personal property here which is liable to the personal property tax.

If it is not so liable, the Act of 1913 applies and appellee must pay a personal property tax. "The defendant below being a citizen of this State, it is clear he is subject personally to its power to tax, and that all his property accompanying his person, or falling legitimately within the territorial jurisdiction of the State, is equally within this authority. The interest which an owner of shares has in stock of a corporation is personal. Whithersoever he goes, it accompanies him, and when he dies his domicile governs its succession": Mc-

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Keen v. Northampton County, 49 Pa. 519, 525; Dupuy v. Johns, 261 Pa. 40, 46.

If the last stated conclusion is not correct, we permit resident holders of valuable shares to escape taxation on the ground that the company whose shares they hold, though stripped of all taxable value so far as its stock is concerned, with no assessable capital, is merely doing business. As first stated, the tax policy is an effort to reach all investments of capital in corporations, except where relieved, as indicated.

The Commonwealth here is not deprived of any tax, and the counties secure that which the legislature intends. In the present case, Gulf Refining Company must account for all the property taxable in Pennsylvania, and it has always so responded. Neither Gulf Refining Company nor its shareholders are injured; Gulf Oil will pay no capital stock tax though accounting for loans, and though its shareholders may not secure the same immunity as subsidiary's stockholders; they stand in a different sphere and are placed on a par with all other investors in the stock of foreign corporations not taxable for state purposes. Until the legislature adopts a different system of apportionment or division of stock value, one representing capital invested in the Commonwealth and the other outside, we may expect difficult problems presented, and in some cases inequality; but, if the bars are thrown down, as urged by appellee, personal property tax in Pennsylvania, so far as it relates to foreign investments, will be a dead letter.

One other question presents itself, and it forcibly illustrates what may be done to escape this personal property tax by means of a very small state tax, illegally assessed. The auditor general, who received and filed a report of the Gulf Company, assessed against it what plainly is a mere nominal tax on capital stock. It is here contended that the auditor general's report, fixing liability to tax, is conclusive, and the court cannot go behind it. The legislature has seen fit to set up two

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taxing tribunals, each having equal powers, to determine a fact, to wit, a corporation's liability to a tax on its capital stock. The auditor general made an assessment or finding; the county, the other cotaxing authority, is in no position to appeal from this action. It could not be heard as a party in interest. If the auditor general's reports are to be received as conclusive, as that official is diligently looking after the state's revenues, one can easily see where the counties might suffer. On the other hand, it would be intolerable to have the auditor general's action subjected to an attack, or set aside indiscriminately, by the sixty-seven county-taxing officials. The court below was in error in holding the report conclusive under the facts in this case. Generally speaking, the reports of the auditor general are not only *prima facie* evidence, but conclusive, except in case of fraud, legal or constructive, or where the face of the report exhibits an assessment of tax contrary to law, or where the officers of the company admit a situation that makes it nontaxable. The cases relied upon relate solely to situations where efforts were made to resist the collection of a tax assessed by the auditor general, and do not reach the facts in this case. Here, all facts necessary to a decision of the case were sworn to by the secretary of the company, and it naturally followed that some explanation had to be made, when the corporate purpose of the holding company, filing the report, was considered. The auditor general accepted the report, as is usual in that office as to the reports of all companies which make returns. In adjusting and deciding questions of the character which arise in setting a capital stock tax, the auditor general hears one side only, and is often not presented with the real problems in dispute; but, even so, we have sufficient admissions in the present record to show the facts before indicated, and upon them we base our decision,—we are not deciding anything about the right to file a consolidated return.

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We now conclude that all the tangible property here involved belongs to the underlying company and all the intangible property is referable to the home of the reporting company, and this corporation, though doing business in Pennsylvania, has no property on which a value may be placed so as to compute a value on its capital stock; consequently, the corporation is not liable to a capital stock tax.

A penalty of fifty per cent for failure to file a personal property return was added, as provided by law. The failure to file the report in this case was due to an honest misconception of the law relative to our taxing statutes. While it is not within our power to relieve appellee from the penalty imposed, we think the board of revision should take this matter into consideration and grant relief as to this item. The county's desire is not to punish but to have the law definitely settled.

The order of the court below is reversed, the decision of the board of revision is reinstated; the appellee to pay the costs.

CONCURRING OPINION BY MR. JUSTICE SIMPSON:

Upon the assumption that *Dupuy v. Johns*, 261 Pa. 40, is not to be overruled (and this seems to be the view of a majority of the court, including the three dissenting Justices), I concur in the order of reversal; not only because this court is "bound to prevent the abuse of its own decision" (*Com. v. Moir*, 199 Pa. 534, 561), but also for the reasons set forth in the opinion prepared by our Brother *KEPHART*, more particularly because the Gulf Oil Corporation,—the value of whose shares of stock appellee seeks to exclude from consideration in fixing the tax due by him,—has no legal power to do anything except to hold the "stocks of subsidiary companies." The place of taxation of such intangible assets is the domicile of the owner, whether a corporation or an individual, unaffected by the fact that the stock certificates may be in another jurisdiction; for,

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after all, they are only evidences of ownership, their location may change from day to day, and thus, unless the domicile of the owner is fixed as the place where they are to be taxed, they may readily escape all taxation.

That they have been taxed, in whole or in part, is a matter of no moment in deciding the question of exemption, for the point at issue is not whether a tax has been assessed and paid, but whether the corporation was "liable" to pay it; and when, as here, this issue is determinable by the charter itself, interested third parties have a right to require the courts to consider and decide it, irrespective of any previous determination by some nonjudicial taxing body. Any other conclusion would result in the gravest injustice, for large corporations could arrange to do a dollar's worth of business in this State, or own a chair or table here, and by paying to the State a tax on this basis could exempt all their shareholders from personal liability on many million dollars' worth of stock.

In my judgment, however, *Dupuy v. Johns*, *supra*, is wrong in principle and should be overruled. In construing statutes relating to taxation, three rules must be steadily borne in mind: (1) No tax can be collected in the absence of a provision clearly imposing it upon the class to which the taxpayer or his property belongs; (2) Where the taxpayer or his property is within the general language of the statute imposing the tax, all exempting provisions are to be strictly construed against the claim for exemption; (3) Provisions relating either to the imposition of or exemption from a tax, are to be so construed as to give effect, as nearly as reasonably may be, to the common law duty to tax equitably and ratably all those within the given class, this subject being partially dealt with also in article IX, section 1, of our Constitution. It was by giving no effect to rule (3) and mistakenly applying the principle embodied in rule (1) instead of that in rule (2) (the last two being often confused with each other, though in no

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way conflicting), that the exempting provision under consideration in *Dupuy v. Johns*, was held to relieve appellee from the tax therein sought to be collected.

The facts in that case, as taken from the opinion of the court, were, "The plaintiff is a resident of Pittsburgh; in his return for the year 1916 he failed to include certain shares of the preferred stock of the Crucible Steel Company of America, then owned by him. The concern in question is a New Jersey corporation, engaged in making steel and products thereof, the value of its total capital stock being approximately \$75,000,000; of this amount, \$14,000,000 is employed in Pennsylvania, and all except \$29,000 exclusively in manufacturing. The company is licensed to do business in this State, and in 1916 it paid a capital stock tax on the before-mentioned \$29,000 amounting to \$169.17." The portion of the Act of June 17, 1913, P. L. 508, 509, under which the liability was sought to be established in that case, provides that residents of Pennsylvania shall be liable to pay a tax upon, *inter alia*, "all shares of stock in any bank, corporation, association, company, or limited partnership, created or formed under the laws of this Commonwealth or of the United States, or of any other state or government, except shares of stock in any bank, corporation or limited partnership that may be liable to a tax on its shares or its capital stock for state purposes under the laws of this Commonwealth, or relieved from the payment of tax on its shares of capital stock for state purposes by the laws of the Commonwealth." We held that, under this excepting provision, the payment of the \$169.17 relieved from taxation all Pennsylvania holders of any part of the \$75,000,000 of stock, although our citizens who held stock in other corporations, domestic or foreign (save as exempt because employed in manufacturing, etc.), were liable to a tax on the full value of their shares, even though no part of the corporation's tangible assets was located in this State. In my opinion appellee, in that case, should have been held liable to

pay a tax upon 61/75 of the value of his shares, and exempted from 14/75 thereof.

It will be noted the exempting provision is: "except shares of stock in any.....corporation.....that may be liable to a tax on its shares or its capital stock for state purposes.....or relieved from the payment of tax on its shares or capital stock for state purposes." If the provision quoted means, as Dupuy v. Johns says, that *any* payment, no matter how small, relieves the stockholder from the tax, then the employment here of *any* part of the corporation's assets for manufacturing purposes, no matter how small, must have a like effect, and the holders of stock in foreign corporations, but a trivial part of whose activities are in the line of manufacturing, will wholly escape, though, under substantially similar language, the holders of stock of domestic corporations will escape only pro rata, that is, to the extent the assets are used in manufacturing and not beyond that. This is not only discriminatory and inequitable, but is also in direct antagonism to rule (2), above stated, and should not be tolerated, unless there is no reasonable way of escape therefrom. It is true stockholders in domestic corporations do not directly pay the tax on their shares, but the corporation pays it for them, and not as a tax on its own assets,—a fact too often overlooked in considering questions arising under these statutes. If "any" or some similar word had been used in the Act of 1913, when referring to the payment or relief from payment of the tax, we might perhaps be required to construe the exempting provision as was done in Dupuy v. Johns, despite the inequality occasioned thereby; but no such word appears, and hence under rule (2), and indeed upon the principle that the legislature will be presumed to know and adopt the construction placed by this court upon similar language in previous taxing statutes, the exemption should be limited accordingly.

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A like conclusion was reached in construing the acts of assembly which exempted "institutions of learning, benevolence or charity, with the grounds thereto annexed and necessary for the occupancy and enjoyment of the same, founded, endowed and maintained by public or private charity," for there we exempted fractions of buildings directly used for the purposes of the charity, and taxed other parts thereof from which a revenue was received: *Young Men's Christian Association v. Donohugh*, 7 W. N. C. 208, approved in *Phila. v. Barber*, 160 Pa. 123, 128; *Board of Home Missions, etc., v. Phila.*, 266 Pa. 405. This conclusion was reached upon equitable grounds and not because the statutes expressly so provided; no reason exists why like equitable consideration should not control the exempting provision in the Act of 1913.

If the reasons thus presented were allowed to prevail *Dupuy v. Johns* would be overruled, and this would result in a reversal of the order of the court below and a restatement of the tax, appellee being held liable for the greater part but not all of the amount claimed. It would also result in that equality of taxation, which necessarily is equity; would give full effect to the action of the state authorities in so far as they assessed a tax for state purposes; would destroy the method which may now be employed, whether by collusion or otherwise, to escape liability under these taxing acts; would remove all the difficulties suggested in the dissenting opinion; and would save the State and her citizens from the dire results which it is supposed may flow from the conclusion reached by the court.

DISSENTING OPINION BY MR. JUSTICE SADLER:

The Gulf Refining Company is a registered foreign corporation, doing business within the Commonwealth, and has been so engaged for many years. The Gulf Oil Company was organized at a later date and received a charter from the State of New Jersey. Its purpose was

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the holding of stocks of subsidiaries engaged in producing, transporting, manufacturing and marketing petroleum and petroleum products, and in pursuance of the powers conferred became the owner of all of the stock of the first named corporation, except qualifying shares of directors. The chief office was in New Jersey, as required by the law of that state, but its actual place of business was in the City of Pittsburgh, where all but one of its directors live, the securities of the company are deposited, banking done, accountings had, and from which point its corporate affairs are directed. Five floors of a large building, the Frick Annex, are occupied for the carrying on of these activities, as I understand the testimony. The office furniture is owned by it; private telegraph lines, leased in the name of its subsidiary, partly within this Commonwealth, are operated by it for communicating on company matters. Though the plants and refineries stand in the name of the subsidiary corporation, the actual control of the various properties is by the Gulf Oil Company, which was duly registered under the Act of June 8, 1911, P. L. 710, and authorized to do business in Pennsylvania, having paid the proper fees and bonus charges. As required by law (Act June 1, 1889, P. L. 420, section 20; Act June 2, 1915, P. L. 730; Act July 15, 1919, P. L. 948), it filed with the auditor general, for taxation purposes, reports of capital stock and loans for 1920. Had this not been done, a penalty would have been collectible, for every corporation which has been registered is required so to do. Act April 14, 1905, P. L. 166. The capital stock was appraised and a charge of \$11,744.10 was duly assessed by the proper officers; the sum levied was paid, as was a tax of \$12,199.25 on corporate loans.

Stock of the Gulf Oil Company was owned by residents of Allegheny County, and the local board of revision included the worth of these shares in fixing the taxable value of the personal property of James D. Callery. This action was set aside on appeal to the com-

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mon pleas, the court holding that the corporation was doing business within the Commonwealth, and liable to state taxation, and came within the exception found in section 1 of the Act of June 17, 1913, P. L. 507, permitting the collection of certain taxes by counties, but reserving to the State definite sources of revenue, which reads, "except [upon] shares of stock in any bank, corporation or limited partnership that may be liable to a tax on its shares or its capital stock for state purposes under the laws of this Commonwealth, or relieved from the payment of tax on its shares or capital stock for state purposes by the laws of the Commonwealth." It was concluded the capital stock of the oil company was within this proviso, and the holder of its shares within Pennsylvania was exempted from local assessment thereon. The correctness of the decision rendered is now challenged.

Prior to the act referred to, personal property taxes were collected for the State, the counties having returned to them a certain proportion of the amount received and forwarded. By that legislation, the former gave up to the latter the right to all receipts in certain cases, retaining to itself however the sums obtained from corporations in the cases excepted by section 1 and fixed by section 17: *Provident L. & T. Co. v. Klemmer*, 257 Pa. 91. The question as to the property intended to be included in the respective classes,—in one of which the county has an interest, and in the other not,—has caused the present contention.

It will be conceded that if the Gulf Oil Company was doing business in Pennsylvania, and was subject to taxation by the Commonwealth, and paid such as was levied, the resident holder of its capital stock would not be subject to local assessment. This was plainly decided in *Dupuy v. Johns*, 261 Pa. 40, and the principle there set forth is, in our opinion, applicable here. The majority decision would, however, distinguish this case on the ground that the Crucible Steel Company,—the for-

eign corporation there considered,—was engaged in manufacturing in Pennsylvania, and therefore taxable on property not exempted by statute; whereas the Gulf Oil Company was not so employed. The latter is a holding company, and has registered and paid the bonus fees charged by the Commonwealth to secure the privilege of acting here. All its directors but one, the management and the officers, accounting department and bank deposits are located within the State. Bills and accounts receivable are payable in Pittsburgh, though this does not necessarily indicate that capital was employed within the State: *Com. v. Ellis Co.*, 237 Pa. 328. The actual manufacturing and selling of the petroleum is conducted in the name of the subsidiary company, the stock of which is held by it, and for which purpose it was duly chartered. What was said in *Com. v. Westinghouse Air Brake Co.*, 251 Pa. 12, would seem to meet such a situation: "It holds the plant [of the refining company] through the medium of the stock of that company. It thereby became none the less the real owner of the plant. It owns the plant and the evidence of its ownership is the shares of stock which it holds in the corporation." Suggestion is made that the present case differs in that the Westinghouse corporation (the holding company), was the real operating body, the subsidiaries constituting but a small part of the whole, whereas here the refining company had greater and broader powers in Pennsylvania than the parent corporation. The difference in the chartered purposes, as I understand, is that the refining company is authorized to manufacture and sell, whereas the oil company is chartered to hold the stock of the company so engaged. Even if there be a distinction such as suggested, the principle recognized in the authority last referred to would still be applicable.

It is undoubtedly true that the foreign corporation is not to be held engaged in business merely because of ownership of shares in the domestic company: *Com. v.*

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Standard Oil Co., 101 Pa. 119. But where the acquisition of the stock forms one of the direct objects of its creation, a different rule applies: Colonial Trust Co. v. Montello Brick Works, 172 Fed. 310; Central Life Sec. Co. v. Smith, 236 Fed. 170; Groel v. United Elec. Co., 69 N. J. Eq. 397, 60 Atl. 822. This distinction was recognized in Com. v. Railroad Co., 251 Pa. 6, 10, where the foreign corporation was engaged "in the exercise of one of the purposes for which it was incorporated, namely, buying and holding the stock and bonds of certain Pennsylvania corporations, and is thus in effect operating these companies as one of its objects of incorporation." Though the two associations remain as separate entities, the substance of the relationship is the matter for consideration by the court: S. G. V. Co. v. S. G. V. Co., 264 Pa. 265; Kendall v. Klapperthal Co., 202 Pa. 596. This is especially true when, as here, the administration and construction of taxing statutes is involved: Com. v. Westinghouse Air Brake Co., *supra*; Western Union Tel. Co. v. Kansas, 216 U. S. 1. The refining company maintains its corporate existence, yet its operations are conducted by the oil company, and, if it were necessary, it might well be said, under the authorities, that this constituted an employment of capital within the State, but it is not essential to so hold to solve the situation as presented by this record.

The evidence justifies the conclusion that the oil company was engaged here, irrespective of the operation of the works of the refining company; certain independent activities within the Commonwealth have already been pointed out, which bring the present case within the ruling of this court in Com. v. Railroad Co., 251 Pa. 6. I cannot agree, as stated in the majority opinion, that the corporation is "doing business" within the purview of the registration and corporate loan acts, and not those regulating taxes on capital stock. It is said that this distinction is justified because a foreign corporation is liable only under the statute regulating state

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assessments, when it is both "doing business and liable for taxation"; and it is suggested that the second condition does not exist here. To so assert, does not seem to me to be borne out by the evidence. Without elaboration, it may be noted that the tangible assets in Pennsylvania are listed in the annual report at a very considerable sum. This item includes real estate held in the name of the refining company, but is not so limited. According to my understanding of the testimony, it certainly embraces capital employed in the ownership of the business equipment of the oil company, and it operates telegraph lines, though it leases them in the name of its subsidiary. The exact valuation of each is not set forth, but that is immaterial; for if there is any tangible property here not exempted by law, or as to which deduction must be made, the company is subject to taxation. This has been held when the only assets of the foreign corporation within the State were office furniture, and certain appliances for loading and unloading vessels, the valuation of which did not exceed \$11,000, a small fraction of the total capital of the company then the subject of consideration: *Com. v. Clyde Steamship Co.*, 268 Pa. 278. The fact that the amount of taxable assets is small makes no difference, the question being whether it has any capital here in service, making it liable to some levy. On the report as filed, the averments in which are not gainsaid, the taxing officials of the State were in duty bound to levy a capital stock tax. If they had not done so they would have disobeyed the mandate of the law. The thought expressed that such a ruling might work injustice to the community in exempting the holdings of stocks of foreign corporations owned by residents, when the company pays but a trifling sum to the State, is satisfactorily answered by the present Chief Justice in *Dupuy v. Johns*, *supra*, at page 5. It follows from what has been said that, in my opinion, the Gulf Oil Company was doing business within the State, and liable to taxation, and

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the auditor general properly made assessment and collected the sum found to be due. If his action was justified, then the court below was right in holding the valuation of the stock in the hands of the resident holder to be void, and as a result necessarily set it aside.

For another reason the judgment, in my opinion, should be affirmed. Reports required by law of all registered foreign corporations were filed, the taxes assessed paid, and no appeal was taken. The action of the state officials necessarily involved findings of fact that the corporation was "doing business and liable to taxation," and this is ordinarily conclusive. Of course, if an assessment is made illegally by the taxing authorities, or if there have been fraudulent practices, a different situation arises; but these questions are not presented here. It is unnecessary to refer to other authorities than *Stratford v. Franklin Paper Mills Co.*, 257 Pa. 163, and the cases there cited, to support this proposition.

It is suggested that a different rule should be applied in circumstances such as now appear, for the reason that the county authorities, whose interests may be adversely affected, are not parties to the settlement. Whether they could intervene in such a proceeding and secure a review of a prejudicial ruling it is not necessary to determine. Prior to 1913, the collection of all personal property tax was primarily for the benefit of the State, though it returned to the county a portion of the sum received, and the manner of correcting improper assessments was fixed by various statutes. In that year the legislature saw fit to give up a further portion of the revenues of the State; but it did not then, nor has it since, provided a different or additional tribunal for the adjustment of disputes. It did not cede the power, which the State then possessed, to determine through its own officials what property was subject to contribution in support of the Commonwealth; by a failure to so grant, the right was reserved. All corporations registered were at that time bound to make reports for con-

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sideration by the officials named, and if any failed to do so, it was penalized. This duty to submit annual statements to the central authority for taxation purposes has been reiterated since by two legislatures.

In the present instance, the company reported as required by law. The proper officials determined, from the facts submitted, the question of liability for tax, and found affirmatively; otherwise a nominal charge would have been made. This action, subject to appeal, binds all parties, and is not reviewable by some other body, not granted such jurisdiction by statute. Pennsylvania Bank Assignees' Account, 39 Pa. 103. The legislature may provide for returns of corporations to counties, and permit the making of independent investigations so that each may determine whether the stock held by residents is subject to local taxation; but no such power has been given. The effect of the majority opinion is to hold that the oil company is not liable to taxation for state purposes on any part of its capital stock, and that foreign corporations, such as it, organized as holding companies, can operate here, exempt from state taxation so far as capital stock is concerned. The far-reaching consequences of so holding may be of great moment to the Commonwealth so far as its revenues are involved; it can well be surmised that the gain in collections to the counties will be far overbalanced by the loss of revenue to the State.

Express provision does appear for determining corporate liability by named officials of the Commonwealth with a right of review. "When the law has confided to a special tribunal the authority to determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive. . . . The right to impose taxes for the support of the government, in all its departments, state, county or municipal, is the prerogative of the legislature. Subject to the restriction of the Constitution, that power may be exercised by such agencies as the legislature has

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established for that purpose": *Erie v. Reed*, 113 Pa. 468, 476. The county is an arm or agent of the State, and has been called a quasi, as distinguished from a municipal corporation: *Bucher v. Northumberland County*, 209 Pa. 618. In neither case can powers be exercised where not granted, or which are withheld, though in many instances the latter is given authority to legislate upon definite subjects. What has been declared as to extent of rights of municipalities is equally applicable to counties, with reference to a subject like taxation, where certain privileges have been conferred. In *Com. v. Moir*, 199 Pa. 541, we said, in part: "Municipal corporations are agents of the State, invested with certain subordinate governmental functions for reasons of convenience and public policy. They are created, governed and the extent of their power determined by the legislature, and subject to change, repeal or total abolition at its will. They have no vested rights in their offices, their charters, their corporate powers or even their corporate existence. This is the universal rule of constitutional law, and in no state has it been more clearly expressed and more universally applied than in Pennsylvania. . . . The fact that the action of the State towards its municipal agents may be unwise, unjust, oppressive or violative of the natural or political rights of their citizens, is not one which can be made the basis of action by the judiciary."

A duly constituted state body has been provided to pass on the necessary questions of fact, involving the taxation of corporations, foreign and domestic, and only one; any other situation would be unfortunate. Unless fraud is shown in the finding made, or the record shows on its face lack of authority to assess,—it does not in the present case,—or that the charge made is merely nominal, there being no taxable assets, as appears in *McMullin's Estate*, 272 Pa. 284, the findings of fact necessarily implied by the assessment are conclusive. To permit the board of revision of each of the sixty-

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seven counties to hold hearings to determine whether foreign corporations, whose stock is held by local residents, are doing business and liable to tax, notwithstanding an affirmative finding by the auditor general, will not only end in confusion as to the results reached, but in great hardship to the holders, who may be called upon to defend their right to exemption by the production of evidence difficult to secure, as well as to the companies, whose officers may be subpoenaed to appear in many different places to explain the manner of conduct of their affairs. To my mind this will be the result of the decision of the majority, and does not find justification in our authorities.

For the reasons stated, I would affirm the judgment.

Justices FRAZER and SCHAFFER concur in this dissent.

McMullin's Estate.

Taxation—Personal property tax—Corporations—Foreign corporation—Tangible property—Registration—Doing business—Acts of June 17, 1913, P. L. 507, and July 15, 1919, P. L. 948—Failure to make return.

1. Shares of stock of a foreign corporation owned by a resident of Pennsylvania are subject to the personal property tax for county purposes under the Act of June 17, 1913, P. L. 507, where it appears that, although the corporation is registered to do business in the State, it has no tangible property in the State subject to the capital stock tax under the Act of July 15, 1919, P. L. 948.

2. The auditor general's assessment of a tax on the capital stock of such corporation is not conclusive upon the county authorities.

3. Registration and authorization to do business are not sufficient to make a corporation liable to taxation on its capital stock.

4. In determining whether a corporation is liable to a capital stock tax, patent rights or assignments thereof, cannot be considered. They are an intangible asset created through federal laws.

5. Nor can the taxing authorities consider United States bonds, stock of domestic or foreign corporations, cash in bank, mortgages

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and other intangible assets that are referable to the domicile of the corporation where such assets have their situs or ownership.

6. Where, on an appeal from a personal tax settlement, there is nothing on the record to show that a foreign railroad corporation has tangible property in this State, so as to render it liable to tax on its capital stock, the county authorities may levy the personal property tax on its stock in the hands of a resident taxpayer.

7. If such company is doing business in Pennsylvania, it is liable to the State for a tax on its bonds, but if it is not doing business, the county is the proper body to receive the tax.

8. Where a citizen acting in good faith fails to make a tax return, and takes an appeal from a personal tax settlement made against him, the board of revision should relieve him from the penalty imposed by the act.

Argued October 20, 1921. Appeal, No. 179, Oct. T., 1921, by Percy F. Smith et al., constituting the Board for the Assessment and Revision of Taxes, from order of C. P. Allegheny Co., July T., 1919, No. 2023, sustaining appeal from tax settlement, in estate of Matthew K. McMullin, deceased. Before MOSCHZISKER, C. J., FRAZER, WALLING, SIMPSON, KEPHART, SADLER and SCHAFFER, JJ. Reversed.

Appeal from tax settlement. Before CARPENTER, J. The opinion of the Supreme Court states the facts.

Appeal sustained. Percy F. Smith et al., Board of Revision of Taxes, appealed.

Error assigned was order, quoting it.

John C. Bane, with him *Oscar T. Taylor*, County Solicitor, and *William C. Jacob*, Assistant County Solicitor, for appellants.

Geo. N. Monro, Jr., with him *Reed, Smith, Shaw & Beal* and *Samuel McClay*, for appellees.

OPINION BY MR. JUSTICE KEPHART, January 3, 1922:

This, like the preceding case, is an appeal from an order of the Court of Common Pleas of Allegheny Coun-

ty, setting aside an assessment for a personal property tax levied against the estate of M. K. McMullin on \$2,145,784.61, representing the value of the shares of stock of the Window Glass Machine Company, American Window Glass Machine Company, Baltimore & Ohio Railroad Company, and bonds of the latter. The court below might have decided the case on the issue raised by the pleadings. In the petition for an appeal from the board of revision to that court, it was averred the companies involved were "foreign corporations registered in the State of Pennsylvania, and authorized to do business in Pennsylvania, and stock and securities in the hands of shareholders in Pennsylvania are not liable to taxation for state and county purposes within the meaning of the legislation relating thereto." The only statement in the petition raising the question of non-liability for taxation is contained in the above quotation that the corporations are "registered and authorized to do business"; as we have shown in our discussion in the previous case, "registration and authorization" are not sufficient to cause a corporation to be liable to taxation. But, as the common pleas court inquired into all the questions here argued, upon which some evidence had been submitted, and as there is an averment in the petition for an appeal that the common and preferred shares of the American Window Glass Machine Company were employed in the manufacture of window glass within the Commonwealth and are entitled to an exemption, we will pass on all questions raised, though the latter averment is indefinite. The company, through its board of directors, performs the obligations of its charter, not the shareholders as such.

The Personal Property Tax Act of 1913 speaks of a tax on shares or capital stock that will relieve the resident holder from personal liability, and, to excuse the appellee estate, it must appear that the shares of stock and bonds held by it are relieved from taxation through

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the several corporations themselves being either liable to a tax or exempt therefrom.

The Act of 1913, imposing a personal property tax, lays a personal levy against the resident for the value of the shares of stock owned by him, unless the corporation issuing such shares is liable for a capital stock tax or exempt therefrom. A corporation capital stock tax is levied against the issued capital stock as measuring the corporation's taxable worth, the value being based on all its assets, less nontaxables, exemptions and assets on which such tax is already paid.

The companies here mentioned filed reports in the office of the auditor general, in each of which the value of the capital stock was assessed at \$1,000, the total assessment being \$3,000. On this a tax of \$15 was paid; it is now proposed this payment shall relieve a personal property tax of \$8,400. Here again is illustrated the grave difficulties that might follow if the reports of the auditor general were always to be received as conclusive, as urged by appellee. We have discussed this phase of the case more fully in the prior opinion.

American Window Glass Machine Company, a New Jersey corporation, owns all of the stock of the American Window Glass Company, "a domestic corporation," amounting to some \$13,000,000. The latter is largely engaged in manufacturing and selling window glass and other commodities in Pennsylvania. All its property is located here except about \$9,000 in the State of Indiana. The American Window Glass Machine Company (the holding company) has an office in the Farmers' Bank Building, Pittsburgh, in which city the secretary and treasurer live. The books of the company are kept there. Its cash and current assets on deposit in this State are \$340,000; its gross revenue is approximately \$4,600,000, and net earnings \$4,200,000. Like its subsidiary, it is incorporated for the purpose of making and manufacturing glass and machinery of all kinds, articles or commodities used in connection therewith, and to

purchase, lease or otherwise acquire patents, trademarks, etc., to grant licenses in respect thereto, and, unlike the subsidiary, to purchase, hold and dispose of stocks, bonds or other obligations of any corporation. Under this latter clause the company functions. The money it has on deposit is not the result of any business action done in this State, other than the receipt of dividends from its subsidiary at the office in Pittsburgh may be regarded as business done in this State. The activities of the company are of an administrative character.

What we said in Callery's Appeal, concerning "doing business" either in an administrative or executive capacity with respect to a subsidiary company, and the ownership of tangible property, is applicable here and needs no elaboration. The same is true as to what we have written in that case in connection with "doing business" and being liable to a capital stock tax or relieved from the payment of such tax, and having capital or property employed within the State.

All the tangible assets involved are owned by the Pennsylvania corporation and not by the New Jersey company. In the report of the holding company to the auditor general the value of intangible assets is placed, in round numbers, at \$20,750,000, with no tangible assets in Pennsylvania. The auditor general, from the report, appraised the value of the capital stock at \$1,000. This was not authorized under the law. The report shows the company to be nontaxable. While it was doing business, through the activities mentioned, sufficient to require registration, as indicated in Callery's Appeal, it was not liable to taxation on stock, and such liability is the necessary fact to relieve the shareholder from personal property tax.

Window Glass Machine Company, a New Jersey corporation, owns shares of stock in the above-named American Machine Company and another foreign corporation. Like the American Machine Company, its officers reside in Pittsburgh, where its books are kept.

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It has on deposit in Pittsburgh a bank account of approximately \$10,000, its gross receipts \$51,000, and its net income, in round numbers, \$44,000. The cash on deposit in the bank was not received as a result of any business done in this State, and is in this respect like the American Window Glass Machine Company. All of the assets of the company, so far as reported, are of an intangible nature. The company has no tangible assets in Pennsylvania. On this report the auditor general made an assessment of \$1,000 and imposed the tax of \$5. This was not authorized, as the company was nontaxable. The assessment against the value of the capital stock was contrary to law.

In determining whether a foreign corporation is liable to a capital stock tax, patent rights or assignments thereof cannot be considered. They are an intangible asset, created through federal laws: *Com. v. Westinghouse, etc., Co.*, 151 Pa. 265, 275; *Com. v. Edison Electric Light Co.*, 157 Pa. 529, 530. Nor can the taxing authorities consider United States bonds, stock of domestic or foreign corporations, cash in bank, mortgages and other intangible assets that are referable to the domicile of the corporation where such assets have their situs of ownership.

The same comment made at the end of our discussion of the liability of the American Window Glass Company applies to the shares of the Baltimore & Ohio Railroad Company, incorporated in Maryland. We do not know whether this company has any property in Pennsylvania,—the report is silent on this point; but if it has such property, or is doing business here, it should make a report. Not having done so, resident shareholders were at liberty to show at the hearing the corporation was, in fact, doing business, and had such property employed here. So far as the present record is concerned, this does not appear; consequently the company in question is not liable to capital stock tax or required to file a loan report. There is nothing in the record to show

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that any of its officers lived here or that the company transacted any character of business here.

The stock and bonds of the Baltimore & Ohio Railroad Company, being stock and bonds of a foreign corporation, held by a nonresident, are liable to a tax under the Act of 1913. Had the company been doing business in Pennsylvania, though not liable to a capital stock tax, it would have been required to file a loan report, and the State would receive the tax on the bonds. Where the company is not doing business, the county is the proper body to receive the tax.

We are not impressed with the argument that the provision in the mortgage requiring the mortgagor to pay the taxes has any significance here. It is a covenant between the contracting parties that does not bind the State or the county.

We therefore find the court below was in error on all items; the estate was liable for the tax imposed by the county and the board of revision was correct in increasing the assessment.

A penalty of 50 per cent for failure to file a personal property return was added, as provided by law. The failure to file the report in this case was due to an honest misconception of the law relative to our taxing statutes. While it is not within our power to relieve the appellee from the penalty imposed, the board of revision should take this matter into consideration and grant relief as to this item. The county's desire is not to punish but to have the law definitely settled.

The decree of the court below is reversed, the assessment of the board of revision of Allegheny County is reinstated; costs to be paid by appellee.

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Syllabus—Statement of Facts.

Stevenson's Estate.

Marriage—Proof of—Cohabitation and reputation—Illicit intercourse—Presumption—Claim of alleged widow of decedent—Husband and wife—Decedents' estates—Evidence—Findings of fact—Orphans' court—Appeal.

1. A finding by the orphans' court that a marriage did not in fact exist between decedent and a woman claiming to be his widow, when based upon sufficient and competent evidence, will not be reversed on appeal, in the absence of manifest error or mistake.

2. When it is attempted to establish marriage without the usual formalities, the courts will examine with great scrutiny an alleged oral marital contract and the conduct of the parties in relation to each other before and after such contract.

3. Where there has been an admitted illicit course of conduct for many years between a decedent and a woman claiming to be his widow, and the woman alleges a marital contract by words spoken by decedent, marriage will not be presumed because of cohabitation and reputation without proof of a changed relation.

4. Marriage is a civil contract by which a man and woman agree to take each other for husband and wife during their joint lives, unless it is annulled by law. Each must be capable of assenting, and must in fact consent to form this new relation.

5. Where an undoubted marriage in some form exists, the courts will hesitate to strike it down; but when the lips of a man are sealed by death, and he leaves no satisfactory evidence as to the existence of such contract, they will be slow to establish it in derogation of the undoubted rights of those who follow him.

Argued October 12, 1921. Appeal, No. 113, Oct. T., 1921, by Nannie G. Stevenson, claiming as widow, from decree of O. C. Allegheny Co., Sept. T., 1920, No. 563, dismissing exceptions to adjudication, in estate of Archibald M. Stevenson, deceased. Before MOSCHZISKE, C. J., FRAZER, WALLING, KEPHART, SADLER and SCHAFER, JJ. Affirmed.

Exceptions to adjudication. Before MITCHELL, J.

The opinion of the Supreme Court states the facts.

Exceptions dismissed. Nannie G. Stevenson, claiming as widow, appealed.

Assignment of Error—Arguments. [272 Pa.

Error assigned, inter alia, was decree, quoting it.

James L. Weldon, with him *H. G. Bye*, *John C. Sheriff* and *Alexander P. Lindsay*, for appellant.—The presumption of the continuation of an illicit relation under the circumstances gives way to the superior presumption, the favorable compliance with the requirements of the law of marriage and common decency: *Knecht v. Knecht*, 261 Pa. 410; *Thewlis's Est.*, 217 Pa. 307; *Kustus v. Hager*, 269 Pa. 103; *Beale v. Kline*, 183 Pa. 149.

All presumptions favor marriage and every bona fide attempt to effect it, and courts are extremely reluctant and rightly so to declare a marriage void except for the strongest and most obvious reason: *Phillips v. Gregg*, 10 Watts 158.

M. W. Acheson, Jr., of *Sterrett & Acheson*, with him *Joseph J. Goldsmith* and *John C. Bane*, for appellees.—There was no such cohabitation and reputation or other evidence as to justify an inference of marriage: *Bicking's App.*, 2 Brewster 202; *Drinkhouse's Est.*, 151 Pa. 294; *Yardley's Est.*, 75 Pa. 207.

When the relation between a man and a woman living together is illicit in its commencement it is presumed so to continue until a changed relation is proved: *Patterson's Est.*, 237 Pa. 24; *Reading F. Ins. & T. Co.'s App.*, 113 Pa. 204; *Keyser's App.*, 124 Pa. 80; *Comly's Est.*, 185 Pa. 208.

All claimant offers is her unsupported, interested testimony of the man's unoverheard supposed admissions, something to be received with caution and scrutiny: *Shuman's Est.*, 45 Pa. Superior Ct. 587, 592.

The alleged Knoxville conversation, even if found, and even if treated as marital, does not establish a contract of marriage: *Hantz v. Sealy*, 6 Binney 405; *Com. v. Stump*, 53 Pa. 132; *Tholey's App.*, 93 Pa. 36; *Reading F. Ins. & T. Co.'s App.*, 113 Pa. 204; *Knecht v. Knecht*, 261 Pa. 410.

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OPINION BY MR. JUSTICE KEPHART, January 3, 1922:

Appellant, Nannie G. Bradley, in 1904, at the age of twenty-five, while employed as a milliner, met Archibald M. Stevenson, the decedent, in Pittsburgh. Thereafter, as she continued in this and other similar positions, the acquaintance ripened into an attachment, followed by a more intimate relation; how soon this occurred after their first meeting does not appear; it was left open to an inference that it was shortly afterwards, and continued until she went to Youngstown, Ohio, and thereafter. Frequent jaunts from Youngstown were taken by them, some quite lengthy, and, as it was inconvenient under such circumstances to travel on a boat or live at hotels as unmarried persons, they registered as man and wife; during these times, when necessity demanded, because a curious situation would be otherwise presented, Stevenson introduced claimant as Mrs. Stevenson. Business and no doubt pleasure required her repeated journeys to Pittsburgh, on such occasions very often staying over night with Stevenson at various hotels, of course as his wife. In 1911 Miss Bradley engaged in millinery business at Youngstown. This was arranged by Stevenson paying a large part if not all of the cost, and keeping the claimant supplied with money at all times while conducting this business.

Whatever may have been the real purpose of the establishment in Ohio, decedent's mother, to whom he was apparently devoted, and to whom he would in time owe much, was living, and his duty, to the point of not marrying, was, as he said, to her; and it may also be inferred he did not want her to know of his unbecoming conduct, which might prove disastrous. Whether the Ohio arrangement was for claimant's benefit or to screen his acts, he knew where Miss Bradley was located at all times, visiting there nearly every Sunday. He presented her with jewelry, money in large sums and valuable shares of stock.

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Early in 1918, a Miss Wise, living in Youngstown, was arranging for her coming marriage to a soldier in camp at Asheville, N. C. The date for the wedding was fixed for the 21st of March. Claimant and Miss Wise were friends. Claimant had inserted an item in the society column of a Youngstown newspaper to the effect that she was to be married to Stevenson March 20th, and, after a trip to Florida and other southern points, they would reside in Pittsburgh. Stevenson did not appear in Youngstown on the day set for the wedding, notwithstanding the fact that the distance is very short. He gave as an excuse, according to Miss Bradley, that he was securing a loan from a bank in Tarentum, but was disappointed, and would have to apply to a Pittsburgh bank. Banking hours close at three o'clock, and Youngstown is within an hour or so's ride from Pittsburgh; on the day fixed for the wedding, Miss Bradley came to Pittsburgh and left in company with Miss Wise for Asheville, with the understanding that Stevenson was to follow. Miss Wise's wedding occurred on the 21st of March, and Stevenson joined Miss Bradley at Greenville, N. C., on the 28th. They remained at this place a few days, and went thence to Knoxville, Tennessee. There appellant insisted on marriage. The excuse for delay had disappeared; his mother had been dead for five years and the engagement was now nearly fourteen years old. He was then informed the trip would end unless they were married. This conversation occurred, which claimant states is a contract of marriage: "I told Arch we would discontinue our trip unless we were married, I could not go any further on the trip, and Arch came across the room, took me in his arms, saying, 'Nancie, as long as you live I would not give you up, I will not give you up as long as I live; from to-night on I am going to give you my name and protect you; you are my wife, I always considered you for years as such; from to-night on we are married, ...I will give you my name and pro-

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tect you as long as I live. Now, ... we are as near and dear to each other as it is possible for us to be, from now on you are Mrs. Stevenson,' and I was satisfied. Q. Did you agree to that? A. I did."

They continued the journey, living at hotels as man and wife, later returning to Pittsburgh. Claimant, in April, moved her furniture from Youngstown into an apartment house at Beechview, Pittsburgh; here Stevenson paid the house bills, including rent. The parties were not introduced as husband and wife, except by relatives of claimant. She was known to tradespeople in that vicinity as his wife, but not to the people generally or any part of them, save as indicated. She had few guests except relatives; to these few she was known as Mrs. Stevenson. Later, when visiting Youngstown or her uncle, she was addressed by letter as Mrs. A. M. Stevenson. The reason for this is obvious,—it enabled them to continue the deception.

Decedent never introduced her as his wife, nor was there an announcement, oral or written, of the fact of marriage. While an apartment was maintained at Beechview, many miles from deceased's usual place of abode or where his friends and acquaintances lived, Stevenson kept another woman in a different part of the city. Appellant knew of this, and would accompany him to her house, remaining outside or at some theater until his visit with the other woman was over. He maintained a residence on Negley Avenue, where his clothing was kept; in this district he also voted. Claimant let rooms in the apartment to others, and, after Stevenson would leave in the evening, she was known to go out and not return until late at night or possibly the next morning.

Stevenson died February 1, 1920, intestate, possessed of a considerable estate, consisting of real and personal property. His immediate blood relatives were a brother and sister. Appellant petitioned for the allowance of \$5,000 as the widow of decedent, and the court below, after full hearing, denied the petition, holding claimant

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was not his wife but his kept mistress. The present appeal challenges the correctness of this finding.

While it is our duty to examine all the testimony, the court below heard the witnesses, and could best judge of their credibility; after a careful consideration and due credit given the evidence of claimant, we are now asked to declare his finding error. It certainly was not a misconception of the law as applicable to the facts, as will appear later. If it was a mistake in a deduction of fact, the burden is on appellant to point it out clearly. It is not enough to demonstrate the fact found is doubtful, or that the finding appears to be against the weight of the testimony. Nor will it avail that we might have reached a different decision had the question been for us in the first instance; we are not in a position to judge the credibility of the witnesses. Their finding of fact must stand unless manifest error or mistake clearly appears: see Comly's Est., 185 Pa. 208, 216; Patterson's Est., 237 Pa. 24, 27; Keyser's App., 124 Pa. 80, 90. We have carefully examined all the evidence, as did the court below, and we do not find sufficient upon which to predicate reversible error.

Counsel for appellee well states: "Marriage exists not only for the happiness of the parties, but for the welfare of society. It is the most important engagement that man and woman can enter into. It is the basis of civilized society, of the home, of the family, of sound morals, and of the domestic affection." When it is attempted to establish marriage without the usual formalities, we should examine the professed contract with great scrutiny, and be entirely satisfied this solemn undertaking has been entered into by the voluntary assent of both parties.

The mere fact decedent joined, ostensibly as husband of appellant, in the conveyance of a few lots in Youngstown, Ohio, where she had lived for some years prior to moving to Pittsburgh, is not conclusive on the question of marriage, nor would the additional facts in evidence

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work such results. The assertion in the newspaper, published in Youngstown, that she was to be married to Stevenson in the south, together with the reported statement the marriage had been consummated, with the same idea prevailing in the scrivener's mind, would no doubt make sale of the lots difficult; to facilitate sales, and to satisfy the purchaser, removing all doubt as to title, it can readily be seen why Stevenson joined in the deed as though her husband: Reading Fire Insurance & Trust Company's App., 113 Pa. 204, 206; Divver's Est., 22 Pa. Superior Ct. 436, 444; Chamberlain v. Chamberlain, 71 N. Y. 423, 426.

This act, like many others before and after the supposed marriage, was done for the purpose of deceiving the public and making their continued illegal relations easier. The same may be said with regard to the circumstances attending leasing the apartment at a place remote from decedent's Negley Street residence, and all dealings with tradespeople in that vicinity. In line with this, may be considered their infrequent social intercourse with claimant's relatives.

Appellant complains the learned judge of the court below laid too much stress on the illicit relation existing prior to the trip south. She voluntarily testified to these occurrences. Our Brother SIMPSON, in Kustus v. Hager, 269 Pa. 103, 108, says: "we must be careful to give to it [the meretricious relation] only the weight which properly flows therefrom," holding that, standing alone, it was insufficient proof of undue influence, but where, as here, we have an admitted illicit course of conduct for many years before the alleged marital contract, marriage will not be presumed because of cohabitation and reputation without proof of a changed relation: Yardley's Est., 75 Pa. 207, 211; Patterson's Est., 237 Pa. 24, 28; Hunt's App., 86 Pa. 294, 297; Grimm's Est., 131 Pa. 199, 202. The evidence of such cohabitation and reputation, as found by the court below, was not sufficient on which to imply marriage. The learned judge

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states: "There is nothing prior to April, 1918, relied upon by the claimant to establish her claim of marriage. There is testimony of an engagement.....but it is a fair inference.....decendent was not eager to enter into the contract. He is evasive to those who mention the matter to him; there is no.....evidence he ever introduced the subject of his marriage to anyone. When asked by the claimant's niece when he was going to be married he answered, 'Some of these days.' Mr. Ruth, who was a willing witness, did not ascertain from the decendent anything definite as to when the marriage might be expected. The letters from decendent to claimant make no mention of an intended marriage. It is noticeable that in the letters introduced from decendent to claimant, bearing dates subsequent to April, 1918, no reference is made to the marriage, nor is there anything to indicate a new relationship. The terms 'husband' and 'wife' are not found in these letters. The claimant seems to have been anxious for the marriage, and indeed she should have been. She had the announcement of her approaching marriage made in the newspapers, but even this did not bring a ceremony. The decendent made excuses for not observing this most important date,—his wedding day,—because of an application for a loan in a bank. With the day of the advertised marriage at hand, something must be done; she goes south and the decendent follows. They resume their meretricious relations, and, on her threatening to discontinue the trip unless a marriage is performed, the scene in the Knoxville Hotel is said to have been enacted.....The Beechview house is rented and the furniture moved in; the decendent does not provide the furnishment; all that goes into the house to equip it is the furniture of the claimant. She is established in the house; he pays the rent, supplies the living and meets all the expenses. The decendent was there much and was seen morning and evening going and coming, according to some neighbors. Here she was installed, in a part of the city known as the South Hills

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district, five miles away, and in quite another direction from the Stevenson Homestead; it was reached by different car lines, and there would be small chance of the decedent's family and friends being frequently in that neighborhood.....The decedent did not introduce or speak of claimant as his wife excepting to merchants and a few neighbors around the Beechview home. This was necessary, for how could they live in a respectable community unless they passed among the people there as husband and wife? There was no recognition nor even knowledge of a marriage among the friends of the decedent. The visitors to the Beechview house were the friends and relatives of the claimant, and they were the ones to whom the representation of marriage was made. After April, 1918, the decedent did address letters to claimant as Mrs. Stevenson, but these letters were sent to her when she was in Youngstown, where her friends supposed her to be married. Similarly addressed letters were written by him to her when she was visiting in the home of her uncle.....As Justice SHARSWOOD said in Bicking's App., 2 Brewster 202, 'A man may live with his kept mistress in such a way as to create a kind of repute of marriage among some persons; he may even, to gratify her, allow himself to be held out, or hold himself out, to her friends and acquaintances, as her husband, may be a constant visitor, sleep and often eat at her house, may recognize the fruit of the connection as his children, and manifest affection and tenderness toward them; yet the evidence may fall far short of that which ought to satisfy the mind that there was an actual agreement to form the lawful relation of husband and wife. The conduct of the parties must be such that almost anyone acquainted with them would naturally infer that they bore that relation to each other.'"

We cannot view what the decedent said on the trip south as being sufficient on which to ground a contract of marriage. When we consider his acts, his failure to appear, the age of the claimant and her knowledge of what

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is necessary to constitute marriage, the avowed purpose of the trip as she describes it, the relationship of the parties for many years before, and, further, the time, place and circumstances under which the language was used, his conduct appears to us in no other light than a reassertion of his protestations written so many times in letters before the trip took place. To this scene must be applied not only knowledge of the precedent facts, but ordinary common sense; and it is useless to discuss it further. It is not the case of a young inexperienced girl, but a woman of mature years, with a knowledge of the world. Moreover, the only evidence as to what took place came from the lips of the claimant, a very much interested party, and must be received with caution and scrutiny. The court below found appellant not to be decedent's wife. He had before him a plain contradiction of the Knoxville statement in the evidence of Ritzzi, the druggist, who testified that, after the return from the southern trip, appellant said she was going to Pittsburgh to be married to Mr. Stevenson, and her subsequent introduction in a garage by her maiden name. But it is more than doubtful if the words used rose to the dignity of a contract "to be performed either in Ohio or Pennsylvania." "Marriage is a civil contract by which a man and woman agree to take each other for husband and wife during their joint lives, unless it is annulled by law, and to discharge toward each other the duties imposed by law upon such relation. Each must be capable of assenting and must in fact consent to form this new relation": *Topper v. Perry*, 197 Mo. 531, 546. We need not rest our decision on the inadequacy of the words, for the contradictions noted would be sufficient to sustain the finding of the court below.

Appellant is wrong in applying the rules of law as to all presumptions being in favor of the marriage contract. It is quite true where an undoubted marriage exists in some form, courts, for obvious reasons, should hesitate to strike it down. The security of homes as well as the

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paternity of children is at stake. But it is equally true that, when the lips of a man are sealed by death, and he leaves no satisfactory evidence as to the existence of such contract, courts will be very slow to establish it in derogation of the undoubted rights of those who follow him. Decedent's conduct may have been the subject of severe censure, as his acts offended all moral laws. Indeed it might have gone still further,—had children been brought into the world,—that, however, is not in this case. But a marriage cannot be presumed from such acts, for to do so would place a premium on illicit relationship. Claimant, better than anyone else, knew her exact standing with Stevenson. She knew she was not accorded the rights of a wife or anything that resembled them. She likewise knew the reason. Those who, with a clear understanding of what the laws require, embark in undertakings such as those found by the court below, must abide by the consequences of their acts. The court will not relieve them unless it plainly appears there was an actual agreement to form the legal relation of husband and wife.

The decree of the court below is affirmed.

Putnam, Appellant, v. Ensign Oil Co.

Promissory notes—Corporation as maker—Note held in due course—Accommodation notes—Defenses—Want of consideration—Note executed in violation of by-laws—Act of May 16, 1901, P. L. 194—Important suggested change in the law.

1. In an action by the holder of a promissory note against the maker, a corporation, where the plaintiff avers in his statement that the notes were endorsed and delivered to his transferor before maturity, and that he is the holder thereof, and proves the execution of the notes and endorsements by intervening endorsees, the notes are properly admissible in evidence.

2. It is not necessary, in such case, for plaintiff to aver that his transferor took the notes in good faith for value, or that it was a holder thereof in due course, and that this should be proved, inas-

much as section 59 of the Negotiable Instruments Act of May 16, 1901, P. L. 201, provides that "every holder is deemed *prima facie* to be a holder in due course."

3. The holder in due course takes the instrument free from a defective title of prior parties, and free from the defenses available to prior parties among themselves.

4. A negotiable instrument gives substantial rights to one who derives his title through a holder in due course, provided the former has not been guilty of any fraud or illegal act.

5. If, however, it appears on the defense that "the title of any person who has negotiated the instrument was defective," the law raises a presumption in the maker's favor, and the burden is then shifted to the holder to show that he, or some one under whom he claims, was a holder in due course.

6. It is not necessary for defendant to show knowledge of the holder in addition to defective title, but a defense of nonliability will not be established solely by this evidence, for the jury must find the holder had knowledge of the defect, and this it must do from the evidence so far submitted, or plaintiff may show he did not have such knowledge.

7. As against a holder in due course, a corporation maker of a promissory note cannot set up the defense that the note was given as an accommodation and without consideration. Section 59 of the Negotiable Instruments Act applies only to defective title, and not to such matter.

8. In an action against a corporation maker of a promissory note, proof that the note was issued by the officers of the company in violation of a by-law, is a complete defense, unless it appears that (a) the corporation received a benefit from the note; (b) that there was a previous course of dealing between the same parties; (c) a previous course of dealing generally under certain circumstances, or (d) that the entire management and control of the company was handed over to one individual.

9. The Pennsylvania rule criticised, and suggestion made that the legislature by appropriate action bring the law of this State into harmony with that of other states.

10. In an action on promissory notes of a corporation maker, plaintiff cannot be charged with notice of the illegality of the notes by proof of an equity proceeding by the receiver of his transferor, in which the legality of the notes was questioned, where it appears plaintiff was not a party to the proceeding, and had no actual notice of the defect in the notes through the proceeding.

11. In such case, the subsequent transfer of the notes by the receiver to plaintiff, alleged to have been without consideration,

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cannot be set up as a defense, as a breach of trust to which plaintiff was a party.

Receivers—Sale of promissory notes—Formal order of sale.

12. The mere fact that certain promissory notes are not included in a formal order to a receiver to sell the assets of a corporation, will not violate a subsequent sale of the notes, if the receiver had a general power to sell.

Statutes—Pleading—Presumption—Fact.

13. It is not necessary to plead a presumption of fact that arises from a given fact under a statute. When the fact is averred the presumption attaches by virtue of the statute.

Argued October 12, 1921. Appeal, No. 116, Oct. T., 1921, by plaintiff, from judgment of C. P. Allegheny Co., April T., 1920, No. 1376, on verdict for defendant, in case of S. H. Putnam v. Ensign Oil Company. Before MOSCHIZSKER, C. J., FRAZER, WALLING, KEPHART, SADLER and SCHAFFER, JJ. Reversed.

Assumpsit on promissory notes. Before CARNAHAN, J.

From the record it appeared that suit was brought to recover on two promissory notes, one of them dated March 11, 1914, to the order of the High Grade Oil Refining Company of New York, for \$2,000, payable at the Dominion Trust Company, Pittsburgh, and signed "Ensign Oil Company, incorporated, William H. Roberts, treasurer, E. E. Arrowsmith, secretary." The other one is dated April 6, 1914, and reads, "One month after date we promise to pay to the order of High Grade Oil Refining Company of New York \$3,000 at Dominion Trust Company, Pittsburgh, without defalcation for value received." Signed "Ensign Oil Company, incorporated, William H. Roberts, treasurer, E. E. Arrowsmith, secretary."

The notes were endorsed to the Dominion Trust Company, which subsequently failed. A receiver was appointed by the Common Pleas Court of Dauphin County. Mr. Adams, as receiver of that company, having en-

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dorsed these notes to S. H. Putnam, the latter now sues to recover on the notes against the maker.

Other facts appear by the opinion of the Supreme Court.

Verdict and judgment for defendant. Plaintiff appealed.

Errors assigned, inter alia, were various rulings and instructions appearing by the opinion of the Supreme Court, quoting record.

William A. Wilson, of *Calvert, Thompson & Wilson*, for appellant.—As there is no claim in this case that appellant is a party to any fraud or illegality affecting the instrument, he consequently has all the rights of the Dominion Trust Co., which transferred the note to him.

There is no denial that the Dominion Trust Co. discounted the notes before maturity and gave value for them, and the fact, if a fact it is, that the maker was an accommodation maker would be no defense against the payment of the notes: *Penn State Deposit & Trust Co. v. Stetson* 175 Pa. 161; *Camden Nat. Bank v. Fries-Bresline Co.*, 214 Pa. 395.

Joseph A. Beck, with him *Lewis P. Litzinger*, for appellee.—The notes never came into the hands of a holder in due course.

The notes were not executed as required by defendant company's by-laws: *Millward-Cliff Cracker Co.'s Est.*, 161 Pa. 157; *Worthington v. Ry.*, 195 Pa. 211; *First Nat. Bank v. Hotel Co.*, 226 Pa. 292; *Corr v. Evans Colliery Co.*, 63 Pa. Superior Ct. 56.

OPINION BY MR. JUSTICE KEPHART, January 3, 1922:

Plaintiff's statement avers the notes in suit were endorsed and delivered to the Dominion Trust Company before maturity and he is the holder thereof. The execution of the notes and endorsements by intervening er-

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dorsees having been proved, they were received in evidence. Plaintiff then rested his case against the maker of the note. Appellee contends there should have been an averment that the Dominion Trust Company, plaintiff's transferor, took the notes in good faith, for value, or that it was a holder thereof in due course, and plaintiff should prove this on the trial of the case. Section 59 of the Negotiable Instruments Act, "every holder is deemed prima facie to be a holder in due course," would be meaningless if this was the law. It is not necessary to plead a presumption of fact that arises from a given fact under a statute. When the fact is averred the presumption attaches by force of the statute. Here we have the statement both plaintiff and endorsers were holders entitled to the benefit of section 59, and plaintiff, with the right of a holder in due course, would take the instrument free from a defective title of prior parties, and free from the defenses available to prior parties among themselves.

Plaintiff became the holder after maturity through one who was a holder in due course. A negotiable instrument gives substantial rights to one who derives his title through a holder in due course, provided the former has not been guilty of any fraud or illegal act. A note in the hands of a holder other than in due course is subject to the same defenses as if it was nonnegotiable, except where he derives his title through a holder in due course and has not been guilty of any fraud or illegality affecting the instrument. In such cases he has all the rights of a former holder (in due course) in respect to all prior endorsees or makers: section 58.

Though plaintiff, by section 59, is entitled to the benefit of this valuable presumption of fact, which makes it comparatively easy for him to establish a prima facie case, still, if it appears in defense that "the title of any person who has negotiated the instrument was defective," the law raises a presumption in the maker's favor and the burden is then shifted to the holder to show that

he, or someone under whom he claims, was a holder in due course. It is not necessary for defendant to show knowledge of the holder in addition to defective title, but a defense of nonliability will not be established solely by this evidence, for the jury must find the holder had knowledge of the defect, and this it must do from the evidence so far submitted, or plaintiff may show he did not have such knowledge: *Catasauqua Nat. Bank v. Miller*, 60 Pa. Superior Ct. 220, 222. When a defect in title appears, the burden is on plaintiff to show that someone in the line of title acquired the note as such holder.

When plaintiff's case rested, he was entitled to the presumption that he took in good faith, for value, and had no notice of a defect in title or an infirmity in the instrument, and unless it appeared the title was defective (section 59), he would have a right to recover.

Defendant proposed to show (1st) defendant was an accommodation maker, receiving no consideration, and the note was ultra vires, and (2d) the notes were not executed by the officers authorized by the by-laws. It is unquestioned plaintiff's prior endorsee discounted the notes before maturity and gave value for them. Generally, a corporation may not become an accommodation endorser or maker of a note, that not being within corporate powers, but defendant, as a corporation, would be no different than a natural person as an accommodation maker; neither could defend on that ground as against a holder in due course. As to him, the accommodation maker is liable on the instrument, notwithstanding that at the time of taking the instrument he knew the maker was only an accommodating party: *Negotiable Instruments Act*, section 37; *Penn Safe Dep. & T. Co. v. Stetson*, 175 Pa. 160, 161. Absence of consideration is no defense as to a holder in due course: section 28; *Cox & Sons Co. v. Brewing Co.*, 245 Pa. 418. This defense is not good against a holder in due course or one who derives title through a holder in due course. The affirmance of defendant's point was, for these rea-

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sons, error; it was as follows: "If defendant received no consideration for the note in suit, the burden was on plaintiff to prove not only that the Dominion Trust Company paid value for the two notes before maturing, but at the time it obtained the said notes it had no notice that defendant received no consideration"; plaintiff, as transferee from the Dominion Trust Company, a holder in due course with the presumption of fact to which it was beneficially entitled, was not required to prove consideration. Section 59 applies only to defective title and section 55 does not cover the matter the point intended to reach.

The further defense that the note was issued by the officers of the company in violation of a by-law which required notes to be signed by the president and secretary, would, under our prior decisions, be a complete defense as against the payee and those under him. This strikes at the integrity of the instrument; it goes farther than challenging title and infirmity,—it challenges the existence of the note as corporation paper. Unless the corporation received the proceeds of the note, or by a course of conduct, as outlined by our previous decisions, is estopped from setting up noncompliance with the by-laws, the defense is good; this, under the evidence, was for the jury, under proper instructions.

Pennsylvania has adhered to the rule that the by-laws of a corporation are written into the charter, defining and limiting the rights, duties and powers of its officers, and places persons dealing with the corporation on notice as to the extent of the officers' power and agency, actual knowledge of the existence of the by-laws being immaterial: *Millward-Cliff Cracker Co.'s Est.*, 161 Pa. 157, 162; *Wayne Title & Trust Co. v. Schuylkill, etc., Co.*, 191 Pa. 90, 96; *Worthington v. Schuylkill, etc., Co.*, 195 Pa. 211, 213; *DeForest v. Northwest Townsites Co.*, 241 Pa. 78, 80. With respect to commercial paper, this rule has been modified in at least four instances, viz: (a) where the corporation receives the benefit from a

note irregularly executed; (b) a previous course of dealing between the same parties; (c) a previous course of dealing generally under certain circumstances; and (d) where the entire management and control of the company is handed over to one individual: see *First Nat. Bank v. Colonial Hotel Co.*, 226 Pa. 292, 296; *Chestnut, etc., Co. v. Record Pub. Co.*, 227 Pa. 235, 240; *First Nat. Bank v. Am. Bangor Slate Co.*, 229 Pa. 27, 32; *Hartzell v. Ebbvale Mining Co.*, 239 Pa. 602, 605.

The Pennsylvania rule does not obtain in other states: 14 C. J. 348, and cases cited in note 48. In most jurisdictions, with but one exception, subject to minor modifications, the by-laws in those states operate merely as regulations among members of the corporation; they have no effect upon contracts or other dealings with third persons, unless they have knowledge of the by-law.

The reason for the Pennsylvania rule is a desire to protect stockholders in every possible way against mismanagement of corporate business; but the proposition is no doubt sound that the business world, constituting by far the greater number of persons interested in the security and integrity of certain commercial acts, may be, and no doubt is, injuriously affected by the continuation of such rule. When our rule was adopted corporations were not so numerous; at present they have taken hold of the vast majority of business enterprises in the country. A large part of our internal and external commerce is transacted through the medium of negotiable notes, frequently termed "couriers without luggage"; and it must appeal to all that these should be made, to the greatest extent possible, freely transferable and transmittable, without any cloud on their integrity. When commercial life, in and out of the Commonwealth, has brought home to it a realization that in this State endorsements of corporation notes can be attacked because contravening a by-law, commercial paper of Pennsylvania corporations will circulate under a most seri-

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ous handicap; it may be necessary to attach to each note a certified copy of the by-law authorizing the officers to act, and, where several companies are thus interested, the difficulties multiply. While no doubt the Pennsylvania law has regulated the matter in the right light, purely from the standpoint of principal and agent, where the inquiry concerns the scope of the agent's authority, and how far his acts bind the principal, yet when, in dealing with corporate commercial paper, we invalidate acts, apparently within the power of certain officers, because forbidden by an unknown internal law of the corporation, this court is out of harmony with other jurisdictions.

The question becomes pertinent, Where an individual is held for acts of this agent, done within the apparent scope of authority, why should a group of individuals, as a corporation, stand in any different position? There is the same element of honesty present in both situations, and, no matter what checks may be taken to protect others, one reaches the point when, unavoidably, a servant's honesty must be depended on, it being always within his power to be dishonest; therefore, it may well be urged that, where commercial paper is signed or endorsed in the usual and customary way, it ought to be binding on a corporation, unless the holder has actual knowledge the note was improperly executed. The public, who usually knows nothing of the by-laws, deals on the faith of the official signatures on the paper, for in a great majority of instances corporate commercial paper is signed in the same way; and there is no reason why this so-called "courier without luggage" should not be at least as safe with respect to corporate signatures as to those of ordinary individuals. Commercial paper endorsed by a corporation is in the nature of a check, and the signature of the treasurer should be binding; possibly this court went so far in *Hartzell v. Ebbvale Mining Co.*, *supra*,—that where the business of the corporation was handed over to one person to transact,

its paper was good, even though not executed according to the by-laws.

It would seem advisable for the law to be, as suggested in other states, that where a note has been signed in the regular way by corporate officers, as, for instance, by the president and secretary, or president and treasurer, or endorsed by the treasurer, such note, in the hands of any holder in due course, or one with those rights, should be good as against the corporation, notwithstanding any by-law to the contrary, unless previous knowledge of the existence of such by-law is brought home to the holder. In this connection, we now have so many forms of indemnification through surety companies, if stockholders need further protection, in addition to the character of their officers, it can be accomplished by the corporation obtaining a surety bond.

The execution of commercial paper is within the apparent scope of the authority of these officers. The same persons may create an indebtedness against the company; they may bind it, through acts done in its behalf, giving rise to negligence; and in many other situations they have implied power to do those things that bind the corporation. It is apparent the necessities of business require the public,—dealing with such officers, on the strength of this apparent power,—to be protected against secret by-laws, which may be changed monthly. This is the law generally prevailing in other jurisdictions; while, owing to the prior decisions of this court and the facts as they may be developed, we cannot follow them in the present case, yet the circumstances give rise to this discussion, and some of us indulge the hope that the legislature, now that attention is called to the matter, will bring our law into harmony with other states.

It was further averred, by way of defense, plaintiff knew the notes were illegal. To show this an equity proceeding in Allegheny County was offered; it there appeared the foregoing defense was made to these notes in an action brought by the receiver of the Dominion

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Company. Plaintiff was not a party to this, and, if it was material, he could not be affected unless he knew of it. There is no pretense plaintiff had actual knowledge of any defect through these proceedings. As a defense, if illegality of issue affected all holders, it was not necessary to show notice to any person. Even if this were a defect in title or an infirmity in the instrument, to charge with notice one who negotiates the note, it must appear he had actual knowledge of the infirmity or defect, or knowledge of such facts that, when he took the instrument, it would amount to bad faith: section 56. Notice was not necessary. The first assignment is sustained.

To show defective title, the transfer of the paper from the receiver was attacked as a breach of trust, being without consideration; and, it is urged, plaintiff, a party to it, should not be permitted to recover under such circumstances. The title is here assailed. A defective title is one where a holder obtains the instrument by fraud, duress, force or fear, other unlawful means, or illegal consideration, in breach of faith or under such circumstance as amounts to a fraud. The proceedings in Dauphin County, authorizing the receiver to sell the assets to the Dominion Trust Company, were offered in evidence. It did not appear these notes were included in the list of securities. It was not necessary for him to receive an order of court to sell, and the mere fact that they were not named in the formal order would not vitiate the sale subsequently made of them. The receiver, when on the stand, was not asked whether he had been paid anything for the notes; but the consideration for the transfer from the receiver to the plaintiff was not in issue (*Camden Nat. Bank v. Fries-Breslin Co.*, 214 Pa 395; 8 *Corpus Juris* 1057); the title was no way in issue unless it appeared an inquiry into it would in some way protect defendant or let in some meritorious defense. Adams, receiver for the Dominion Company, was present in court and knew of this litigation; defendant could not be called on again to respond for the amount

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of the note. The Dauphin County court had jurisdiction over Adams and any breach of trust to creditors. The sum paid for the transfer could not be inquired into in this action. If it was prejudicial to creditors, the court, having control of the receiver, will correct it. The second and fourth assignments are sustained.

Judgment reversed and a venire facias de novo awarded.

Glockner v. Pennsylvania Railroad Co., Appellant.

Negligence—Railroads—Master and servant—Defective coupler—Safety appliance—Federal acts—Contributory negligence—Federal Employers' Liability Act of 1908—Federal Safety Appliance Act.

1. A brakeman who is injured while engaged in interstate commerce employment, by the failure of a defective coupler to act, may recover damages from his employer, although he himself may have been guilty of contributory negligence.

2. The Federal Safety Appliance Act provides that an employee shall not be held to have assumed the risk of an injury due to the use of a coupling which fails to comply with the law, and the Federal Employers' Liability Act of 1908 takes away the defense of contributory negligence if a defective coupler contributed to the injury.

Appeals—Statement of questions involved—Evidence.

3. Questions sought to be raised in the appellate court will not be considered if they are not included in the appellant's statement of questions involved.

Argued October 14, 1921. Appeal, No. 145, Oct. T., 1921, by defendant, from judgment of C. P. Allegheny Co., Oct. T., 1920, No. 261, on verdict for plaintiff, in case of Frank J. Glockner v. Pennsylvania Railroad Co. Before FRAZER, WALLING, SIMPSON, SADLER and SCHAFER, JJ. Affirmed.

Trespass for personal injuries. Before SHAFER, P. J. The opinion of the Supreme Court states the facts.

1922.] Verdict—Opinion of the Court.

Verdict and judgment for plaintiff for \$6,865.84. Defendant appealed.

Errors assigned, among others, were refusal of judgment n. o. v. for defendant, quoting order, and various rulings and instructions (not included in the statement of questions involved), quoting the record.

Robert D. Dalzell, of *Dalzell, Fisher & Dalzell*, for appellant, cited: *St. L. & S. F. R. R. v. Conarty*, 238 U. S. 243.

J. Thomas Hoffman, for appellee, cited: *Louisville & Nashville R. R. v. Layton*, 243 U. S. 621; *Lindway v. R. R.*, 268 Pa. 491; *C., B. & Q. R. R. v. U. S.*, 220 U. S. 574; *San Antonio Ry. v. Wagner*, 241 U. S. 477; *St. Louis & I. Ry. v. Taylor*, 210 U. S. 281; *C., R. I. & P. R. R. v. Brown*, 229 U. S. 321.

OPINION BY MR. JUSTICE FRAZER, January 3, 1922:

On the evening of March 29, 1917, between 9:30 and 10 o'clock, plaintiff, employed by defendant as a yard brakeman, was injured by falling over an obstruction while walking alongside a slowly moving train, for the purpose of holding in place the lockpin of a defective car coupling device. In the statement of claim it is alleged plaintiff was in the performance of his duties, at the time engaged in interstate commerce, and that defendant failed to comply with the provision of the Federal Safety Appliance Act, requiring its cars to be equipped with automatic couplers operated without the necessity of the brakeman placing himself between the ends of the cars. The verdict of the jury in favor of plaintiff established the existence of a defective coupler and that its defect contributed to plaintiff's injury. From the judgment entered defendant appealed. We must, therefore, consider whether there is evidence to sustain this finding.

The coupler used on the car in question was equipped with a lockpin, adjustable by a hand lever operated from the side of the car, thus avoiding the necessity of the brakeman placing himself in a dangerous position between the cars. The evidence shows that if a coupler of this pattern is in proper working condition the pin, when raised by the lift-lever, remains upright and the cars become uncoupled and separated from others of the train.

In this case the pin, after being raised by the lever, failed to remain in place and release the coupling pin, and to overcome this defect plaintiff walked alongside of the cars with his hand on the lift-lever, holding the pin in position, as the train was backing slowly. While proceeding in this manner he fell over an iron beam which extended into his pathway, receiving the injury for which this action was brought to recover damages. Witnesses who examined the coupler following the accident testified that the lock-pin, designed to hold the coupling pin in place when raised, was missing.

The contention of appellant is that,—it being conceded the pin was susceptible of being raised by the lift-lever without the necessity of plaintiff going between the ends of the cars, even though it refused to remain in position when raised by the lifting appliance, and, as no necessity appeared for plaintiff to raise the pin until the cars came to a stop,—plaintiff's negligence and not the defective condition of the coupler, was the proximate cause of the accident. Assuming plaintiff was negligent in attempting to prematurely uncouple the cars and in adopting a dangerous method in so doing, in place of a safer one, his improper act will not relieve defendant from liability. The Federal Safety Appliance Act provides that an employee shall not be held to have assumed the risk of an injury due to the use of a coupling which fails to comply with the law, and the Federal Employers' Liability Act of 1908 takes away the defense of contributory negligence if a defective coupler contributed

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to the injury. Consequently, if a defect existed in the coupler,—and the jury so found,—and an injury was sustained by the employee during an attempt to operate the device, plaintiff's negligence cannot be held to be a defense. See *Crumley v. R. R.*, 272 Pa. 226, and federal decisions there cited.

In the third and fourth assignments of error, appellant attempts to raise questions relating to the competency of medical testimony introduced during the trial of the case and also to the correctness of language used by the trial judge at the conclusion of his charge. These assignments are without merit; however, as the questions sought to be raised are not included in appellant's statement of questions involved, they need not be considered further.

The judgment is affirmed.

Walker et al. v. Mason, Appellant.

Contract—Sale by periodical deliveries—By-product of plant—Incorporation of vendors—Assignment—Personal qualities of vendors—Mutuality—Assignability—Pleadings.

1. Where two partners enter into a contract for the sale of an entire by-product of their plant for a year, and thereafter incorporate their business, the purchaser cannot rescind the contract, on the ground that it was for services of a personal nature and not assignable, if it appears that the production did not depend on the personal skill or ability of any one person, that the business was continued under the same general management, with the same employee and the identical plant equipment, and that no question of credit was involved.

2. As the subject-matter of the sale was the production for a whole year, and as this could be definitely ascertained, the contract did not lack mutuality.

3. Where, in such case, suit is brought on the contract in the name of one of the partners trading under the firm name to the use of the corporation, and this is subsequently amended by adding the name of the other partner to that of his copartner, the defendant cannot claim that recovery could be had only, under the plead-

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ings, for the material produced by the partnership, excluding that produced by the corporation.

4. The rights of plaintiffs under the contract accrued or to accrue were assignable, and the liability of defendant thereunder could not be split up in different actions. A judgment thereon would protect defendant from another suit for the same cause of action.

Fictitious name—Trading under—Partnership—Act of June 28, 1917, P. L. 645.

5. Where two members of a partnership have traded for forty-six years under the name of "W. & H. Walker," and it appears that the same partnership name was used by the partner's uncle and father, who founded the business, and had identically the same names as the son and nephew, the use of the firm name by the latter is not a violation of the Act of June 28, 1917, P. L. 645, forbidding trading under a fictitious name.

6. The fact that one of the partners added the word "Junior" to his name is immaterial.

7. Where the name indicates the actual ownership of the business, a contract will be enforced.

8. Partnerships openly using the true names or surnames of their members in their firm name in such manner as to fairly advise of the parties owning or conducting the business and not to mislead, are not to be regarded as under false, assumed or fictitious names.

Argued October 17, 1921. Appeal, No. 80, Oct. T., 1921, by defendant, from judgment of C. P. Allegheny Co., Oct. T., 1919, No. 1992, on verdict for plaintiffs, in case of William Walker and Hay Walker, Jr., partners, trading and doing business as W. & H. Walker, for the use of W. & H. Walker, Inc., v. Charles F. Mason, trading and doing business as the Mason Oil Company. Before FRAZER, WALLING, SIMPSON, KEPHART and SCHAFER, JJ. Affirmed.

Assumpsit for breach of contract. Before CARPENTER, J.

The opinion of the Supreme Court states the facts.

Verdict and judgment for plaintiffs for \$2,135.25. Defendant appealed.

1922.] Assignment of Error—Arguments.

Error assigned, among others, was refusal of judgment for defendant n. o. v., quoting record.

George H. Rankin, for appellant.—The contract involved relations of personal confidence and was not assignable.

There was no mutuality of obligation and therefore no contract to assign.

Plaintiffs declare for goods produced by the legal plaintiffs, and it was error to permit recovery for goods produced by the use-plaintiff: *Montgomery v. Cook*, 6 Watts 238; *McNulty v. O'Donnell*, 27 Pa. Superior Ct. 93; *Reis v. McDevitt*, 219 Pa. 414.

Individuals conducting business under the name of W. & H. Walker, not registered as required by Act June 28, 1917, P. L. 645, are not entitled to recover on a contract for sale of merchandise made in violation of that statute: *Swing v. Munson*, 191 Pa. 582; *Com. M. Fire Ins. Co. v. Sharpless*, 12 Pa. Superior Ct. 333; *Kernchen v. English*, 70 Pa. Superior Ct. 293; *Vandegrift v. Vandegrift*, 226 Pa. 254; *Feldgus v. Friedman*, 269 Pa. 60.

Frederick H. Atwood, for appellees.—The contract was assignable by W. & H. Walker, a partnership, to W. & H. Walker, Inc.: *Galey v. Mellon*, 172 Pa. 443.

The contract does not lack mutuality.

Plaintiffs declared upon a contract entered into by the legal plaintiffs and assigned by them to the use-plaintiff; they did not declare for goods produced by the legal plaintiffs alone: *Galey v. Mellon*, 172 Pa. 443; *Citizen Trust & S. Co. v. Howell*, 19 Pa. Superior Ct. 255.

The name "W. & H. Walker," a partnership composed exclusively of William Walker and Hay Walker, is not assumed or fictitious within the meaning of the Act of 1917.

Even if the name "W. & H. Walker" comes within the prohibition contained in the Act of 1917, the appellee's

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failure to register did not defeat their right of recovery : Harris v. Runnels, 53 U. S. 79; Moyer v. Kennedy, 76 Pa. Superior Ct. 523; O'Hare v. Bank, 77 Pa. 96.

OPINION BY MR. JUSTICE FRAZER, January 3, 1922:

William and Hay Walker, brothers, as copartners for forty-six years, were engaged in the manufacture of soap in the City of Pittsburgh under the firm name of W. & H. Walker. On April 29, 1918, they entered into a contract with defendant, trading as the Mason Oil Company, whereby they agreed to sell and defendant agreed to purchase a by-product of their plant designated as "residue of still commercially known as 'candle pitch'" for a stated cash price per ton, the total quantity being designated as "W. & H. Walker production.....from May 1, 1918, to May 1, 1919." On January 1, 1919, plaintiffs incorporated their business under the name of W. & H. Walker, Inc., and all the assets of the partnership were formally transferred to the corporation, the latter assuming all obligations of the former and continuing the business as before. Candle pitch to the extent of over 26 tons was produced during the year; defendant, however, refused to accept and pay for the product, whereupon this suit was brought in the name of the partnership to the use of the corporation to recover the contract price. All disputed questions of fact were decided by the jury in favor of plaintiffs and from judgment entered on the verdict defendant appealed.

The first contention of defendant is that the contract involved a relation of personal confidence and integrity between the parties and, consequently, was not assignable. We see nothing in the facts of the case, or in the relationship of the parties to the contract, to bring the questions involved within the rule making contracts for services of a personal nature unassignable. The subject-matter of the sale was a mere by-product resulting from the operation of plaintiffs' plant by numerous employees, its production not depending upon the skill or

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ability of a particular person (Galey v. Mellon, 172 Pa. 443) and involving nothing of a personal nature. There is no element of distinctive value as in the case of manufactured goods of a particular brand. Neither is there any question of extension of credit involved, the sale being for cash f. o. b. plaintiffs' works.

A further reason exists why the contention of defendant cannot prevail. We find no change in the personnel of the plaintiff firm after its incorporation, in fact there was none. The business was owned and operated by the same persons with the same employees and the identical plant equipment, nor was there a material change in its management. The sole change was in the legal entity from a partnership to a corporation. It does not appear how this difference, practically in name only, so far as this case is concerned, could possibly have affected the performance of the contract.

The contention that the contract is unenforceable, owing to want of mutuality, is also untenable. This is not a case where the quantity to be delivered under a contract is not specified, leaving the parties free to take or deliver such amount as they might choose, as in *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.*, 114 Fed. 77, and *Hazelhurst Lumber Co. v. Mercantile L. & S. Co.*, 166 Fed. 191, relied on by defendant. The subject-matter of the sale was the "W. & H. Walker production" for one year, which could only mean the entire production. Although no specific quantity was stated, the amount to be delivered was capable of being definitely ascertained, and it was that amount, whether large or small, plaintiffs agreed to sell and defendant agreed to purchase. Plaintiffs were thus deprived of the right to sell elsewhere and defendant was bound to take the entire candle pitch product. These obligations were mutual and constituted a binding contract: *Ramey Lumber Co. v. Lumber Co.*, 237 Fed. 39, 43.

The action was first brought in the name of Hay Walker, Jr., trading as W. & H. Walker, for the use of

W. & H. Walker, Inc., William Walker not being active in the business. It was averred "plaintiff," meaning the legal plaintiff, produced the pitch from May 1, 1918, to May 1, 1919. An amended statement was later filed adding the name of William Walker and changing the above averment to the plural, stating "plaintiffs produced" the pitch. Defendant contends recovery should have been confined, under the pleadings as first stated, to the pitch purchased from the legal plaintiffs, excluding that produced by the corporation after its organization, and that the claim of the legal plaintiffs and that of the use-plaintiff in a single action was an improper joinder. The claims were not distinct and separate, constituting two causes of action. Both arose under the same contract. The contract being assignable, the assignment might properly have been made before performance was begun or after performance, either in whole or in part: *Galey v. Mellon*, supra. In either case the rights of plaintiffs under the contract accrued or to accrue were assigned and the liability of defendant thereunder could not be split up in different actions: *Hopkins v. Stockdale*, 117 Pa. 365, 368. He was entitled to have the entire controversy settled in one action, whether by plaintiffs or their assignee. The assignee, as use-plaintiff, was, consequently, entitled to recover the full amount due under the contract, whether such amount accrued before or after the assignment. The judgment will protect defendant from another suit for the same cause of action: *Montgomery v. Cook*, 6 Watts 238; *Guaranty T. & S. D. Co. v. Powell*, 150 Pa. 16.

It is also claimed that the contract is unenforceable because, at the time entered into, plaintiffs had not registered their partnership under the Act of June 28, 1917, P. L. 645, making it unlawful for individuals to carry on business under an assumed or fictitious name, style or designation, without having filed a certificate showing the names of the parties interested in such business. A discussion is unnecessary of the question whether, in ad-

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dition to the penalties prescribed by the above act, contracts entered into by a copartnership without having complied with its provisions are void and unenforceable, for the reason, in our opinion, plaintiffs were not doing business under a fictitious name.

"W. & H. Walker" was the name of the original firm established eighty years before the contract was entered into and conducted by the father and uncle of plaintiffs. It happened that plaintiffs bore the same names as the persons who originally organized the firm and, upon succeeding to the business, no occasion existed for changing the firm name. They continued to do business under that name for forty-six years. While it is true Hay Walker added the word Junior to his name this addition was merely a matter of convenience for identification. As both parties used their individual names there is nothing fictitious about the firm name under which plaintiffs did business. The identity of the members of the firm was fully disclosed and not in any manner concealed. Accordingly, the case is not within the mischief the Act of 1917 was intended to remedy. This distinction was recognized in *Befarah v. Spell*, 96 S. E. (N. C.) 949, where it was held that a statute of North Carolina, forbidding the transacting of business under an assumed name, unless a certificate giving names of owners should be duly filed, did not require a certificate to be filed by a firm doing business as "Aboud Bros." and another doing business as "The Raleigh Bargain House, Nossif & Befarah, Proprietors," the court saying: "In a case at the present term, *Jennette Bros. Co. v. Elisha Coppersmith & Wife*, 97 S. E. 54, the court held that, where the style and title of the business containing the surname of the proprietors was such as to afford a reasonable and sufficient guide to a correct knowledge of the individuals composing the firm, the case did not come within the statute; this not being in any sense an 'assumed name' within the meaning and purpose of the law we are

of opinion that both of these firms,.....come within the principle of that decision."

It may be observed also that the contract in this case does not purport to be made by a firm but provides that "W. & H. Walker, of Pittsburgh, Pa., agrees to sell," etc., and it was signed "W. & H. Walker, J. C. Baird." It has been held, in jurisdictions which have adopted the view that failure to comply with the act renders contracts unenforceable, in construing statutes similar to ours, that where the title indicates the actual ownership of the business the contract will be enforced. Thus in Michigan though the rule is consistently followed by the court of that state that contracts made by firms who have not complied with the act cannot be enforced (*Cashin v. Pliter*, 168 Mich. 386; *Maurer v. Greening Nursery Co.*, 168 N. W. 448, and cases cited) those cases were differentiated by the United States Circuit Court of Appeals in *Carland v. Heckler*, 233 Fed. 504, where a contract signed "The Lakeside Dredging Co. by" the individual members but expressly stated it was "by and between [H. & B.] copartners doing business in the firm name of Lakeside Dredging Company" was held not to violate the act, the court saying (page 506): "The pivotal question thus is whether, in the absence of express statutory declaration to that effect, we should ascribe to the legislature an intention to forbid recovery by any copartnership under any contract it has made in compliance with law, where not only actual information of the names of the copartners is given, but where the contract is made by such copartners in their full and true names, merely because the partnership was at the time engaged in business under an assumed name, and had not given constructive notice to the public of the names of members of the firm. *Cashin v. Pliter*, does not answer this question.....The purpose of the statute as stated by the Michigan Supreme Court is 'to protect the public against imposition and fraud, prohibiting persons from concealing their identity by doing busi-

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ness under an assumed name, making it unlawful to use other than their real names in transacting business without a public record of who they are, available for use in courts, and to punish those who violate the prohibition.' The instant case is not within the mischief which the statute is designed to prevent, for here there was no concealment, but, on the contrary, express disclosure of the identity of the copartners; and their real names were in fact used in the transaction involved." To the same effect and holding that partnerships openly using the true names or surnames of their members in their firm name in such manner as to fairly advise of the parties owning or conducting the business and not to mislead, are not to be regarded under false, assumed or fictitious names, see *Zemon v. Trim*, 181 Mich. 130, and cases there cited.

The judgment is affirmed.

Colwes, Appellant, v. Meyer.

Equity—Findings of fact by chancellor—Evidence—Mental capacity to execute deed—Appeal—Review.

Findings of a chancellor based on sufficient and competent evidence, although contradicted, that a person was mentally capable of executing a deed, will not be reversed on appeal, except for manifest error.

Argued October 17, 1921. Appeal, No. 99, Oct. T., 1921, by plaintiff, from decree of C. P. Allegheny Co., July T., 1920, No. 1301, dismissing bill in equity, in case of Mable Louise Colwes v. Frank P. Meyer et al. Before FRAZER, WALLING, SIMPSON, KEPHAET and SCHAFER, JJ. Affirmed.

Bill in equity to cancel deed. Before FORD, J.

The opinion of the Supreme Court states the facts.

Bill dismissed. Plaintiff appealed.

Assignment of Error—Opinion of the Court. [272 Pa.
Error assigned, inter alia, was decree, quoting it.

A. L. Cramer, for appellant.

A. M. Imbrie, with him *Leander Trautman*, for appellee.

PER CURIAM, January 3, 1922:

Plaintiff and her sister were the owners of the premises No. 5440 Center Avenue, Pittsburgh, subject to the life estate of their mother. On July 19, 1915, with her mother and sister and the latter's husband, she joined in conveying the property, through an intervening trustee, to her brother-in-law for the nominal consideration of \$1. Upon the death of her mother, four and one-half years later, plaintiff repudiated the transfer and filed the bill in this case to have the deeds annulled and set aside, alleging that, at the time of their execution, she was a morphia addict to such extent as to render her incapable of understanding the nature of her act in executing the conveyance. The court below found plaintiff at that time was mentally capable of understanding the import of the instrument and the consequence of her act and dismissed the bill. Plaintiff appealed.

This court on numerous occasions has said the findings of a chancellor based on conflicting evidence will not be disturbed except for manifest error: *Steinmeyer v. Siebert*, 190 Pa. 471; *MacDougall v. Citizens Nat. Bank*, 265 Pa. 170. Following the rule laid down in these and many other cases, our only duty here is to examine the testimony and ascertain whether the findings of fact are supported by ample evidence. This we have done and are clearly of the opinion the findings and conclusions of the court below should not be disturbed. We find testimony tending to show the existence of a strong affection between the mother and the two daughters. They continued the family relation following the

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death of Doctor Martin, the husband and father, living together in the Center Avenue home. The daughters both assigned to the mother their interest in the personal estate of the father and also joined with their mother in placing a mortgage upon the Center Avenue home to secure the payment of \$4,500, borrowed for the use of the mother. Later Mrs. Martin became financially embarrassed, taxes remained unpaid, default was made in the payment of interest and current bills exceeding the amount of \$1,200 were overdue. The market for real estate was inactive and an attempt to borrow additional money on the premises to meet these obligations failed. Following family conferences, at which Mrs. Martin, her two daughters and son-in-law were present, the latter proposed to purchase the property for the sum of \$8,000 to be paid by assuming the \$4,500 mortgage, paying \$1,500 in cash to be used in discharging debts, giving his note for \$2,000 and agreeing to provide a home for Mrs. Martin for life. This proposition was acceptable to all and, upon execution of the deeds, plaintiff's brother-in-law carried out his agreement. Plaintiff accompanied her mother and sister to the office of an attorney, a reputable member of the Allegheny County Bar, who prepared the deeds for the transfer and, upon their execution, she expressed satisfaction with the arrangement, as it relieved her mother from further financial worry. Further, it is uncontradicted that, following the death of her mother, in discussing the affairs of her father's estate with her sister and brother-in-law, plaintiff said she executed the deed to her brother-in-law for her mother and would do so again. This testimony indicates a desire on part of plaintiff and her sister to act for the best interest of their mother and that they believed they were so doing in providing a home for her during life.

Although the testimony shows plaintiff was for about one year previous to July 19, 1915, addicted to the use of morphia in varying quantities, it does not sufficiently

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appear that the drug had the effect of impairing her mind and incapacitating her from comprehending her act in assenting to the transfer of the property to her brother-in-law and in executing the deed to consummate the acceptance of his proposition to purchase.

The decree of the court below is affirmed at plaintiff's cost.

Fiscus, Appellant, v. Fiscus.

Deed—Parent and child—Conveyance for support—Mental capacity of grantor—Confidential relation—Burden of proof—Evidence—Party dead.

1. Where aged parents convey land, under an agreement for support and burial, to an unmarried daughter, who had lived with and cared for her parents during a period of years after her brother and two unmarried sisters had left the common home, and the daughter fulfills her agreement, the burden of proof, in the absence of evidence of fraud, is not on her, after the parents' death, to show that she did not secure the deed by undue influence, or at a time when the grantors were mentally incapable.

2. Where a brother, after the death of his father and mother, files a bill in equity against a sister for the cancellation of a deed given by his parents to the sister in their lifetime, the brother is an incompetent witness, as to matters occurring in the lifetime of the parents.

Argued October 24, 1921. Appeal, No. 84, Oct. T., 1921, by plaintiff, from decree of C. P. Armstrong Co., Dec. T., 1916, No. 122, dismissing bill in equity, in case of A. B. Fiscus v. Agnes Fiscus. Before MOSCHZISKER, C. J., FRAZER, SIMPSON, KEPHART, SADLER and SCHAFER, JJ. Affirmed.

Bill in equity to rescind a deed. Before BOUTON, J., specially presiding.

The opinion of the Supreme Court states the facts.

Bill dismissed. Plaintiff appealed.

1922.] Assignment of Error—Opinion of the Court.

Error assigned, inter alia, was decree, quoting it.

C. E. Harrington and H. A. Heilman, for appellant.

E. O. Golden and Harry C. Golden, for appellee, were not heard.

PER CURIAM, January 3, 1922:

James Fiscus and wife, by deed dated September 25, 1909, and recorded four days later, conveyed a farm, valued at about \$10,000, to an unmarried daughter, Agnes Fiscus, the named consideration being \$1. By written contract, executed at the same time, the grantee agreed to support her father and mother on the conveyed premises during their natural lives, and, after their respective deaths, to give each of them a suitable burial, to pay any doctor bills or other expenses connected with their maintenance and last illness, and to make certain payments amounting to \$810 to other children and grandchildren of grantors. James Fiscus was eighty-two and his wife eighty years old at the date of the deed; subsequently they died, the former on June 17, 1915. After this, although the deed in question had been on record for some years and there was evidence to show that the present complainant had actual as well as constructive knowledge of its existence, A. B. Fiscus, a son of grantors, filed a bill in equity against his sister Agnes, alleging mental incapacity on the part of the father at the execution of the deed, also that the conveyance had been procured by undue influence and fraud. After hearing, on answer and proofs, the bill was dismissed. Plaintiff has appealed.

The chancellor found, *inter alia*, that plaintiff had "failed to establish, by sufficient evidence, or a fair preponderance of evidence, any of the material averments in the bill"; and concluded that "the deed in question,—being the voluntary act of the grantor, who, at the time of the execution thereof, was mentally capable of under-

standing his act [and the instrument having been] executed without fraud, accident or mistake, coercion or undue influence on the part of the grantee or any one else, upon promises of a valuable consideration, which [promises] were duly kept and performed [by the grantee, so far as the parties concerned permitted]—will not be disturbed in this proceeding.”

It is contended that the chancellor erred in assuming that the burden of proof was on appellant; but we see no error in that respect.

In the absence of anything to show that an unfair advantage was taken of her father by defendant, to obtain the deed here sought to be set aside, we agree with the court below that the “confidence and trust” reposed in this child, who lived with and cared for her parents during a period of years after her brother and two unmarried sisters had left the common home, did not create a situation to shift the burden of proof, and that the rule laid down in *Carney v. Carney*, 196 Pa. 34, prevails (also see *Compton v. Hoffman*, 265 Pa. 257, 263; *Neureuter v. Scheller*, 270 Pa. 80, 85); nor, under the established rules which guide us in such matters, can we say after reading the testimony, the court below was wrong in the following excerpt from its opinion: “But even if, by reason of the relation of the grantor to the grantee, the burden of proving the righteousness of the transaction rests upon the defendant, that burden has been fairly met and overcome by the evidence which, in our opinion, is entirely sufficient to warrant the conclusion that the transaction was fair, open and above board, without fraud, and that no undue influence was exercised by the grantee or any one else upon the grantor to induce the making of the deed.”

As to the complaint that the trial judge declined to permit appellant to give testimony against defendant of matters occurring in the lifetime of their parents, we held, in *Campbell v. Brown*, 183 Pa. 112, 118, 120, where a sister, after the death of her father, brought suit in

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equity against a brother, to set aside a conveyance of property to the latter, which had been made by decedent, that the plaintiff was an incompetent witness. In addition, we may say that, so far as the record indicates, the evidence refused in the present case was merely cumulative.

The assignments disclose no reversible error; they are all overruled.

Decree affirmed at cost of appellant.

Miles's Estate.

Decedents' estates—Intestate laws—Representation among collaterals—First cousins—Second cousins—Acts of April 8, 1833, P. L. 316; April 27, 1855, P. L. 368; June 30, 1885, P. L. 251; May 25, 1887, P. L. 261, and June 7, 1917, P. L. 429.

1. Under the Act of June 7, 1917, P. L. 429, where an intestate leaves no nearer kindred than first cousins and second cousins, the latter do not share with the former in the distribution of the estate.

2. Where there is a complete default of all those in whom the right of distribution is bestowed by the first nine sections of the act, but there are living three first cousins, children of two deceased aunts, and two second cousins, grandchildren of another deceased aunt, all of whom are descendants of one of the deceased grandparents of the intestate, the first cousins take to the exclusion of the second cousins.

3. By linking together the 10th, 11th and 19th sections of the Act of 1917, and considering the 12th, the proper construction is reached that, when there is no living grandparent, and first cousins of the intestate survive him, second cousins, also surviving, are not next of kin (nearest blood relations), nor can they take by representation; hence they do not take at all.

4. The Act of 1917 was not intended to change existing law and set up representation among collaterals generally.

5. Section 10 of the act merely introduces the idea, in a general way, of who, in default of the nearer kindred provided for in the earlier sections, may inherit; it does not undertake to specify under what conditions the surviving grandparents, or the descendants of dead grandparents, respectively, shall take, or in what proportions; that is left to section 12, which fully covers the ground.

6. The legislation from 1833 to 1917 on the subject of representation among collaterals, considered and explained.

Statutes—Construction—Views of framers of laws—History of statute—General revision of laws.

7. While courts may not resort to views expressed by those who either draft or enact laws, for the purpose of determining the meaning of the words employed therein, yet, in order to get at the old law, the mischief and the remedy, and properly to understand and construe a statute embodying the latter, the history of the enactment may always be considered.

8. When a statute under consideration is a general revision, the law, as therein written, will be deemed to be the same as it stood prior to the revision unless the courts find from the statute itself, or its history, a clear intention to change it.

Argued October 24, 1921. Appeals, Nos. 61 and 62, by Emma Marks Ross and Charles P. Marks, from decree of O. C. Allegheny Co., Nov. T., 1920, No. 171, dismissing exceptions to adjudication, in estate of Kate Miles, deceased. Before MOSCHZISKER, C. J., FRAZER, SIMPSON, KEPHART, SADLER and SCHAFER, JJ. Affirmed.

Exceptions to adjudication. Before TRIMBLE, J.

The opinion of the Supreme Court states the facts.

Exceptions dismissed. Emma Marks Ross and Charles P. Marks, second cousins of deceased, appealed.

Error assigned, inter alia, was above decree, quoting it.

William B. Secrist, for appellants.—Section 10 is a positive enacting clause of definite and unambiguous meaning, directing that a certain class, to wit, grandparents or descendants of deceased grandparents, shall inherit and in default thereof, the next of kin.

Under that section, standing alone, all descendants of deceased grandparents not specifically provided for in preceding sections of the act would take the estate as a class, per capita.

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Section 11 simply provides for a manner of inheritance among certain classes of descendants of deceased grandparents, i. e., by representation.

The portion of section 11 providing for representation in the case of grandchildren of brothers and sisters is but a repetition of the law as stated in section 9 of the act.

There is no logical reason why representation should be refused to grandchildren of uncles and aunts when it is expressly permitted under section 12 of the act in cases where there is a surviving grandparent.

There has been no judicial interpretation of the effect of these two sections together, the effect of provisions similar to section 11 having been construed only in determining next of kin under prior statutes.

Watson B. Adair, for Jane P. McHenry, appellee, quoted in his paper-book the notes in full of John Marshall Gest, Geo. E. Alter and Thomas J. Baldrige, commissioners, relating to sections 10, 11, 12 and 19 of the Act of 1917.

George B. Berger, with him *Calvert, Thompson & Wilson*, for Edward Smith and Charles P. Smith, appellees.—The legislature did not intend to alter the intestate law by the Act of 1917.

Where the codifiers give their reasons for a change in the law or make a statement that no change is intended and the legislature adopts the law as drafted by the codifiers, the courts, when called upon to construe the law, have always given great weight to their report. See *McDowell v. Addams*, 45 Pa. 430, and *Whittaker's Est.*, 175 Pa. 139, in both of which cases the opinion of the court quotes from the reports of the codifiers.

OPINION BY MR. CHIEF JUSTICE MOSCHZISKER, January 3, 1922:

The question here presented involves the right of appellants, who are second cousins, to share with first

cousins in the distribution of the estate of an intestate, there being no nearer kindred.

The Act of June 7, 1917, P. L. 429, designates the persons who are entitled to the real and personal estate of an intestate after the payment of all just debts and legal charges. The first eight sections of the statute determine the distributive shares of the spouse, issue, father and mother; and, in absence of these, the ninth section provides for a division among certain collateral heirs and kindred.

In the present case, as previously indicated, there is a complete default of all those on whom the right of distribution is bestowed by the first nine sections of the act, but there are living three first cousins, children of two deceased aunts, and two second cousins, who are grandchildren of another deceased aunt, all of whom are descendants of one of the deceased grandparents of the intestate.

Appellants contend that the inheritance falls to the first and second cousins together, each one of whom is entitled to share "per capita," as a member of a "new class of collateral heirs," under section 10 of the act before us for construction, which provides that, "in default of all persons hereinbefore described, the real and personal estate of the intestate shall descend to and be distributed among the grandparents or descendants of deceased grandparents of such intestate, and, in default thereof, to and among the next of kin to such intestate."

The part of the act just quoted is vague and indefinite; it fails either to say or suggest what possible groups of the persons indicated are to inherit, how these groups are to be ascertained, and whether those composing them take, as individuals, per stirpes or per capita. The section is evidently intended as a general one, which does not attempt to mark out the respective rights of the parties included in it. To construe this part of the act so as to bring about the results contended for by appellants

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would lead to such radical departure from the historical development of our intestate law, and the system of representation there built up, that one is necessarily led to investigate the subsequent provisions of the statute, in order to find the real meaning of the portion in controversy; and, fortunately, when this is done, light is seen. Before entering upon a consideration of these other sections, however, it may be well first to trace briefly the progress of legislation, for much the better part of a century past, bearing on the question we have to solve.

Under section 8 of the Act of April 8, 1833, P. L. (1832-3) 316, 318, no representation was admitted among collaterals after brothers' and sisters' children: *Parr v. Bankart*, 22 Pa. 291, 295.

The Act of 1833 was followed by that of April 27, 1855, P. L. 368, which, by section 2, extended representation among collaterals to the grandchildren of brothers and sisters and the children of uncles and aunts.

The effect of the last mentioned statute was two-fold; it introduced a new class of collateral heirs, to wit, those who were too remote by one generation to take under the Act of 1833, and it substituted a per stirpes for a per capita rule of inheritance among those named in the act, even where all who inherited were of equal degree: *Lane's App.*, 28 Pa. 487, 488. In other words, those who inherited thereunder did so not as next of kin, but as collateral heirs taking by representation (*Brenneman's App.*, 40 Pa. 115; *Hayes's App.*, 89 Pa. 256, 260); but this was changed by the Act of June 30, 1885, P. L. 251, which, going back to the rule that prevailed under the Act of 1833, provided by section 1 that, when those who inherited were of equal degree, they should take per capita as next of kin, the provision in question being in substantially the same language as that employed in section 19 of the present act, which we shall discuss later on.

After the Act of 1885, whenever the only persons to take were first cousins,—that is, children of uncles and aunts,—distribution was made among them per capita and not per stirpes (Cremer's Est., 156 Pa. 40); and in Rogers's App., 131 Pa. 382, distributing the estate of an intestate who died in 1886, we held that second cousins were not entitled to participate as against first cousins; see also Stewart's Est., 147 Pa. 383, 385.

Subsequently, the Act of May 25, 1887, P. L. 261, was passed; this (which is reproduced in section 12 of the present act, discussed *infra*) provided for cases where the intestate left a living grandparent, and the children and other descendants of a deceased grandparent, and was intended to prevent the former from taking to the exclusion of the latter; but, when there was no living grandparent, first cousins—being children of uncles or aunts—still took to the exclusion of children of deceased first cousins: Whitaker's Est., 175 Pa. 139, 141, 143.

In the case last cited, we adopted the opinion of Judge PENROSE, and, in disposing of a contention similar to the one here urged,—that the effect of the act in question was to extend, unrestrictedly, representation among collaterals,—this learned jurist traced the historical development of the intestate law to date, and, after showing the grave dangers of such a system of unlimited representation, said: "The old rule [of limited representation].....has prevailed with great benefit to the community for more than sixty years; during which time it has been held in very many cases that first cousins take to the exclusion of second cousins (Brenneman's App., 40 Pa. 115; Lindley's App., 102 Pa. 235; Rogers's Est., 131 Pa. 382; Cremer's Est., 156 Pa. 40). It is [here] solemnly argued, however, that.....[the rule] has been repealed by the Act of May 25, 1887, that the mischief and confusion effectually prevented by the Act of 1833 have been restored, and that representation among collaterals.....now extends indefinitely and to

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the remotest degree. A result so disastrous can only be accomplished by an express repeal of the eighth section of the Act of 1833 or by an enactment clearly and unqualifiedly inconsistent with it; it certainly is not attempted by the [present] act."

With the law in the condition indicated, the Intestate Act of 1917 was passed. While section 10 of this statute provides that, in default of other and nearer kin, the estate of an intestate shall descend to "grandparents or descendants of deceased grandparents," it is evident from the other parts of the act that this is intended in a general sense and as merely introductory to subsequent, more specific, provisions, particularly section 12, which continues the existing rule laid down in the Act of 1887, *supra*, that, when a living grandparent is nearest of kin to an intestate and, at the time of the latter's death, there are also alive descendants of a deceased grandparent, these descendants represent the latter and share the estate of the intestate with the surviving grandparent, in the manner specifically provided.

When sections 10 and 12 are read together, we see that it never was intended by the former to change the established policy of our law and set up unlimited representation among collaterals generally (this conclusion is reinforced by a consideration of certain other sections, which we shall presently discuss); nor was it specifically intended that, with first cousins of an intestate alive, second cousins should inherit as representing their parents, or otherwise,—which parents, we may remark, would be first cousins to the intestate, in the same class with other first cousins, and, if alive, entitled to inherit with them,—but if we take the words as they stand in section 10, without reference to other parts of the act, and give them controlling significance, as appellants would have us do, this construction, carried to its logical conclusion, would mean that both first and second cousins should take at the same time, and, since the language there employed does not say the estate

shall go to such of the descendants of deceased grandparents as may be nearest of kin to the intestate, but simply,—without limitation,—that it shall go to “descendants of deceased grandparents,” this might, in many cases, lead, in effect, to children representing their living parents, which, of course, is contrary to the per stirpes rule: *Shoch's Est.* (No. 2), 271 Pa. 165. Parts of the act subsequent to section 10, however, forbid any such distribution as contended for by appellants; and thus we see that the section in question cannot have the meaning they would give to it.

While section 12, already referred to, extends somewhat the principle of representation among collaterals taking thereunder, yet the provisions of that section apply only where “one or more than one grandparent” is alive and entitled to take at the death of the intestate; and the extended representation there provided for is confined to “children or other descendants of any deceased grandparent,” when, and only when, they share the estate involved with a surviving grandparent. Section 10 merely introduces the idea, in a general way, of who, in default of the nearer kindred provided for in the earlier sections, may inherit; it does not undertake to specify under what conditions the surviving grandparents or the descendants of dead grandparents, respectively, shall take, or in what proportions; that is left to section 12, which fully covers the ground.

Section 11 reenacts the rule provided in earlier legislation, that “the grandchildren of brothers and sisters and the children of uncles and aunts shall be entitled to take by representation the shares.....which their parents would have taken if living”; but it expressly states that, “except as hereinafter provided, there shall be no [other] representation admitted among collaterals”; the words “as hereinafter provided” evidently having application to the representation among descendants of a dead grandparent referred to in section 12, and before discussed in this opinion.

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The part of the act now under consideration, section 11, apparently deals with the phase of the principle of representation which determines who are entitled to take, and not with its other phase,—how division shall be made among those so entitled; the latter aspect of the matter seems to be provided for by section 19, as follows: “Whenever real or personal estate shall descend to or be distributed among several persons, whether lineal or collateral heirs or kindred, standing in the same degree of consanguinity to the intestate, if there shall be only one of such degree, he shall take the whole of such estate, and if there shall be more than one, they shall take in equal shares, and, if real estate, shall hold the same as tenants in common.”

The provision, just quoted, that lineal or collateral heirs standing in the same degree of consanguinity to the intestate shall take in equal shares, when read with the provision in section 11, that “there shall be no representation admitted among collaterals after the grandchildren of brothers and sisters and the children of uncles and aunts,” shows plainly that the 10th section, depended on by appellants, cannot be given the effect of setting up unlimited representation among collaterals; nor can it be construed to set up a new class of collateral heirs, who, although of different degrees, all being “descendants of deceased grandparents of the intestate,” would take equally the estate of the latter, as contended by these second cousins,—such a scheme of distribution is so unusual in our law as to require plain and unequivocal language to establish it (*Whitaker's Est.*, 175 Pa. 139, 143), which we do not find here.

In *Hayes's App.*, 89 Pa. 256, 260, construing that part of the old law which provided, “there shall be no representation admitted among collaterals after brothers' and sisters' children,” we said its effect was “to exclude children of uncles and aunts wherever there were uncles and aunts living”; so the effect of the words, “there shall be no representation admitted among col-

laterals after. the children of uncles and aunts," contained in the present act, is to exclude grandchildren of uncles and aunts (the position occupied by the present appellants) wherever there are children of uncles or aunts living.

We agree with the court below that "a clear view of the legislative intent is found by linking together the tenth, eleventh and nineteenth sections of the act [and considering the twelfth]. It then appears that, when there is a lapse of all of those in succession to the intestate provided for in the other sections, the descendants of deceased grandparents inherit, ... [but when there are] cousins german., [being] in the same degree of consanguinity, they take the whole of the estate in equal shares; and this view of the legislative intent precludes a distribution to the second cousins." In short, when there is no living grandparent, and first cousins of the intestate survive him, second cousins, also surviving, are not the next of kin (nearest blood relations), nor can they take by representation; hence they do not take at all.

The Act of 1917 was the result of the efforts of a commission, appointed by the governor of the Commonwealth, to codify, or assemble into one group, the numerous provisions on our statute books dealing with the intestate law and kindred matters; and the commission itself framed the act. The bill thus prepared was passed by the legislature without the slightest deviation from the recommendations of its draftsmen, so far as the portions having any bearing on this case are concerned; and, when the historical development of this branch of our statutory law is considered, together with the whole structure of the present statute, it is apparent that no radical changes or departures from preëxisting rules of inheritance were intended. On the contrary, the mischief to be corrected lay in the fact that there were too many acts covering the subject-matter, not that the rules there laid down were either wrong or undesirable, and

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the remedy intended, at least as to the sections here involved, was simply their codification, or putting together, in a single act. Of course, this combination of various legislative enactments into one statute necessitated the insertion of certain introductory parts, and, as already said, section 10 is of that nature; it must be taken with the other parts, to which it is introductory, in order to ascertain its true meaning.

While it is well settled that courts may not resort to views expressed by those who either draft or enact laws, for the purpose of determining the meaning of the words employed therein (see opinion of the court below in *Com. v. Mathues*, 210 Pa. 372, 392, and authorities there cited), yet, in order to get at the old law, the mischief and the remedy, and properly to understand and construe a statute embodying the latter, the history of the enactment in question may always be considered; and when the statute under consideration is a general revision, "the law as therein written will be deemed to be the same as it stood prior to the revision, unless we find from the statute itself, or its history, a clear intention to change it": *In re Lis's Est.*, 139 N. W. 300, 302, and cases there cited; see also authorities in 36 Cyc. 1223.

The United States Supreme Court has recently decided, in *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, that the report of a committee, having a bill in charge during its passage, "may be regarded [judicially] as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure"; but it is not necessary to express our view on this point or resort to such an expedient in the case at bar, for, as already shown, when the history of the legislation and all cognate parts of the present act are considered together, the meaning of the statute becomes reasonably clear. We may add, however, that when the report of the commission which drafted the present act is examined, to ascertain what that body was endeavoring to express (a course pursued by this court in *McDowell v. Addams*,

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45 Pa. 430, 433, when construing the old Intestate Act of 1833; see also Whitaker's Est., 175 Pa. 139, 140-2, and *In re Lis's Est.*, supra), it is of interest to observe that the notes, on the several sections of the act to which we have referred in this opinion, show the intention of the original draftsmen, so far as the meaning of these parts are concerned, is borne out in the construction placed upon their work by the court below, and concurred in here.

The decree is affirmed; costs to be paid out of the estate.

**Danish Pride Milk Products Co. v. Marcus et al.,
Appellants.**

Contracts—Payment—Accord and satisfaction—Agreement to receive back merchandise—Contemporaneous agreement—Principal and agent—Evidence—Party dead—Agent—Authority—Accepting benefits—Estoppel—Hearsay—Harmless error—Delay—Act of May 23, 1887, P. L. 158.

1. A vendee's payment for such part of the merchandise as he has resold, accompanied by an offer to return the balance, does not constitute an accord and satisfaction.

2. It is proper to admit in evidence a contemporaneous agreement made in connection with a sale of merchandise by which the vendor agreed to accept a return of the portion of the goods which the vendee was unable to sell.

3. Where such an agreement is made by an agent, and the vendor confirms it, and retains the benefit thereof, he cannot repudiate the agent's authority to make the agreement.

4. In such case, the vendee is a competent witness, although the agent is dead, to testify to the oral agreement, inasmuch as the agent was not a party to the thing or contract in action, although he represented the vendor. The Act of May 23, 1887, P. L. 158, does not apply.

5. Where a vendor confirmed an order taken by an agent, and retained the benefit thereof, it cannot repudiate his authority to make the alleged oral agreement.

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6. It is error for the court to admit in evidence complaints of the goods made in statements by persons who had purchased them from defendants. Such evidence is mere hearsay.

7. Where the quality of the goods is put in issue by the statement of claim and the affidavit of defense, the vendor cannot contend that the admission of hearsay evidence was harmless error for the reason that the vendees were precluded from interposing the quality of the goods as a defense, because of the long delay in returning or offering to return them.

Argued October 17, 1921. Appeal, No. 120, Oct. T., 1921, by defendants, from judgment of C. P. Allegheny Co., Jan. T., 1921, No. 337, on verdict for plaintiff, in case of Danish Pride Milk Products Co. v. Jacob C. Marcus et al. Before FRAZER, WALLING, SIMPSON, KEPHART and SCHAFFER, JJ. Reversed.

Assumpsit for goods sold and delivered. Before SWEARINGEN, P. J.

The opinion of the Supreme Court states the facts.

Verdict and judgment for plaintiff for \$1,914.59. Defendants appealed.

Errors assigned, among others, were (1) refusal of defendants' motion for judgment n. o. v., and (3, 4), rulings on evidence, referred to in the opinion of the Supreme Court, quoting record.

Charles H. Sachs, of *Sachs & Caplan*, with him *J. J. Goldsmith*, for appellant.—The court should have affirmed the defendants' request for binding instructions: *Royal Ins. Co. v. Beatty*, 119 Pa. 6.

The court erred in refusing to permit defendants to prove the inducing promise to the giving of the order: *Excelsior S. F. & L. Assn. v. Fox*, 253 Pa. 257; *Shields v. Hitchman*, 251 Pa. 455; *Gandy v. Weckerly*, 220 Pa. 285; *Croyle v. Land & Imp. Co., Ltd.*, 233 Pa. 310; *Federal Sales Co. v. Farrell*, 264 Pa. 149; *Singer Mfg. Co. v. Christian*, 211 Pa. 534.

Blythe S. Weddell and *M. J. Hosack*, for appellee,
cited: *Shields v. Hitchman*, 251 Pa. 455.

OPINION BY MR. JUSTICE WALLING, January 3, 1922:

Plaintiff is a corporation engaged in the sale of milk products at Sheyboygan, Wisconsin, and defendants are wholesale dealers in dairy products, etc., at Pittsburgh, Pa. On June 16, 1920, defendants gave plaintiff, through its agent, a written order for eight hundred cases of a certain brand of condensed milk called "Enzo Milk," at \$5 per case, subject to plaintiff's confirmation, which was given, and the milk shipped to Pittsburgh where it arrived and was received by defendants on July 1st. The terms were "2% 10 days"; but no payment was made until September 2d, when defendants enclosed a check for \$300, accompanied by a letter as follows, viz: "We have written to you that it is impossible for us to sell your Enzo Milk, and we are again writing you that we are absolutely in no position to handle it. We have sold sixty cases to different customers and we get complaints all around. We are enclosing a check for \$300 three hundred dollars for the sixty cases and ask you to make disposal of the 740 cases. We have paid the storage until Oct. 8, 1920." Plaintiff retained the check, but made no reply to the letter, and, on October 18th, brought this suit in assumpsit for the balance of the contract price. A week later defendants shipped the 740 cases back to plaintiff, who declined to accept the same, but thereafter, defendants refusing to recall the shipment, sold the milk at \$3.50 per case, for the latter's account. In view of which, plaintiff filed an amended statement giving defendants credit for the net amount so received. Plaintiff averred, and submitted evidence to prove that the milk delivered July 1st, was of the quality ordered,—in the language of the trade, "sound milk." In reply, defendants averred and submitted evidence to show the milk was fermented, rendering it unsalable and unfit for its intended use as an

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article of food. The jury found for plaintiff for the amount of the claim as amended and, from judgment entered thereon, defendants have appealed.

The check sent September 2, 1920, reads, "Pay to the order of Enzo Milk Company \$300 three hundred dollars. In full payment of your invoices for period ending 6/29/20"; and defendants contend that, in view of the language therein, its retention by plaintiff, and the later return of 740 cases of milk, operated as a full discharge of the claim in suit. This contention is without merit; especially as the letter accompanying the check states it is "for the 60 cases." The statement that it was "in full payment of your invoices," did not change the fact that it paid for only 60 of the 800 cases. The making of a small payment on a large account for goods purchased will not liquidate the entire debt, even when accompanied by an unaccepted offer to return sufficient of the goods, at cost prices, to equal the balance of the claim. In other words, a vendee's payment for such part of the merchandise as he has resold, accompanied by an offer to return the balance, does not constitute an accord and satisfaction, and the facts here do not constitute an estoppel. Even giving the check the effect of a receipt in full, it would be only prima facie evidence of payment, and is not that when read in the light of the accompanying letter. The milk shipped back to plaintiff was deteriorating and subject to demurrage charges, and, as plaintiff had notified defendants to remove the same or it would be sold for their account, the credit given them for the amount of such resale was all to which they were entitled. See section 60 of the Sales Act of May 19, 1915, P. L. 543, 560.

Defendants had never handled any of the Enzo Milk, and the affidavit of defense avers, in effect, that they expressed to plaintiff's agent doubt as to their ability to sell the same and gave the order only because of a verbal agreement then made by the agent that plaintiff would take off their hands all of the eight hundred cases which

they were unable to sell, and that they were only able to sell the sixty cases. At the trial, one of the defendants was called as a witness in support of the alleged verbal agreement and, on objection, his evidence as to that was excluded by the trial judge. This was error. A contemporaneous oral agreement, on the faith of which a written contract was executed, may be shown although it varies the terms of the latter: *Excelsior Sav. F. & L. Assn. v. Fox*, 253 Pa. 257; *Croyle v. Cambria L. & I. Co.*, 233 Pa. 310; *Gandy v. Weckerly*, 220 Pa. 285; *Greenawalt v. Kohne et al.*, 85 Pa. 369. Proof of the oral agreement, however, must be clear, precise and indubitable; and, whether, if true, it is such is a question for the court, but cannot be determined until all of the evidence bearing thereon is submitted.

The defendant called as a witness was not rendered incompetent because of the death of plaintiff's agent, as the latter was not a party to the thing or contract in action (Act of May 23, 1887, P. L. 158), although he represented plaintiff in the transaction: *Sargeant v. Ins. Co.*, 189 Pa. 341; *Am. Life Ins. & Trust Co. v. Shultz*, 82 Pa. 46. And see *Dillon's Est.*, 269 Pa. 234. As plaintiff confirmed the order taken by the agent, and retained the benefit thereof, it cannot repudiate his authority to make the alleged oral agreement: *Federal Sales Co. v. Farrell*, 264 Pa. 150; *Singer Mfg. Co. v. Christian*, 211 Pa. 534; *Keough v. Leslie*, 92 Pa. 424; *Caley v. Phila. & Chester County R. R. Co.*, 80 Pa. 363.

Plaintiff offered in evidence the deposition of its president, John F.ENZ, and the trial judge, over defendants' objection, admitted the following question and answer therein, viz: "Q. State whether or not any complaints have been received from the purchaser [at the resale] to the effect that the milk was sour and unfit for consumption? A. No complaints have been received from Seggerman Brothers [the purchasers] but on the contrary, they have expressed their entire satisfaction with the milk delivered to them." This should have been ex-

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cluded as it got before the jury the mere hearsay declarations of those who repurchased the milk. Their statements if deemed important, should have been given under oath and subject to cross-examination.

Appellee contends the question of hearsay evidence is unimportant for the reason defendants are precluded from interposing the quality of the milk as a defense, because of their long delay in returning or offering to return it. Unfortunately for this contention, the quality of the milk is expressly put in issue by the statement of claim and affidavit of defense; and the evidence submitted by each party bears largely on that question; hence, it cannot be affirmed that the improper admission of the hearsay evidence was harmless error. Moreover, the pleadings raise no question as to the effect of the lapse of time preceding defendants' offer to return the milk.

Our conclusions, as above stated, sustain the third and fourth assignments of error; thereupon the judgment is reversed and venire facias de novo awarded.

Fitzgibbon's Estate.

Wills—Construction—Agreement of legatees as to construction of will—Widow's election—Estoppel—Married women—Control of personal property—Husband and wife—Act of June 8, 1898, P. L. 344.

1. Where a testator, leaving to survive him a widow and three daughters, directs that his estate shall be kept intact at least for ten years, unless his wife should remarry, in which event the estate should be settled, and further directs that any moneys given to his daughters or set aside for them should not be charged up against them in settling the estate, this to be in place of insurance, which amounts "they shall share and share alike in case of either one of the three daughters demise then her share shall revert to the other two and so on to the last one left living of the three," the survivorship relates to the expiration of the period of ten years

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and refers to the residuary estate, and not to the insurance fund, which testator did not intend to form a part of his estate.

2. If, in such case, the words relative to the death of the daughters be applied to the insurance money, no provision is made in the will for either the division of the estate, or its vesting; and the testator must be held to have died intestate as to all the rest of his property, constituting the larger part of his possessions. A construction of the will which favors intestacy is to be avoided, if possible.

3. The widow's election to take against the will, with full knowledge of the distribution of the insurance fund among her daughters, estops her from making any claim to that fund.

4. Where the three daughters, one of whom is married, executed an agreement, without the joinder of the married one's husband, that all of the estate of their father, with the exception of the insurance funds, already distributed, should remain intact, for the period of ten years from testator's death, the daughters to receive the income therefrom and to "hold the estate as tenants in common with the right of survivorship," the husband of the married daughter, after the death of his wife, can claim no interest in the personal estate through his wife.

5. Under the Act of June 8, 1893, P. L. 344, the married daughter had the full right to dispose of her personal property without her husband's consent or joinder.

Argued October 18, 1921. Appeals, Nos. 140, 141, 142 and 163, Oct. T., 1921, by Gertrude G. Fitzgibbon, Eleanor Fitzgibbon and Margaret V. Fitzgibbon, from decree of O. C. Allegheny Co., April T., 1920, No. 126, dismissing exceptions to adjudication, in estate of William Fitzgibbon, deceased. Before FRAZER, WALLING, SIMPSON, KEPHART and SCHAFER, JJ. Affirmed as to No. 140. Reversed as to Nos. 141, 142 and 163.

Exceptions to adjudication. Before MILLER, P. J.

William Fitzgibbon died on September 12, 1916, leaving to survive him Gertrude Fitzgibbon, his wife, and three daughters, Eleanor Fitzgibbon, Frances F. Grote, wife of Ludwig I. Grote and Margaret V. Fitzgibbon. Mrs. Grote died on April 26, 1919, leaving her husband to survive her.

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The will of William Fitzgibbon and agreement known in the case as Exhibit H are as follows:

I. William Fitzgibbon of Carnegie Pennsylvania doe Make and Publish this my last will and testament, herby revoking and make void anny former will by me at anny time here tofore made

First. that my Just debts and funeril expenses Shall be fully Paid and satisfied, by my Execters as soon as may be after my decease

Second. My Estate shall be kept in Tact at least for ten years unless My wife Should get married agan In that Event the Estate shall be Setteled up and Devided but anny moneys Given to My Daughters or Set aside For them and its Earnings shall not be Charged up against them in Settelling my estate this is to be in place of Insurance whitch I should of carried for them. and whitch my Personal Book will show the amounts and places deposited in whitch amounts They Shal share and Share alike in Case of Either one of The Three Daughters Demise then her share Shal revert to the other two and sow on to the last one left living of the Three.

Third. I apoint my Thre Daughters Elliner Fitzgibbon Francis Fitzgibbon Mrs. L. I. Grotty and Margaret Fitzgibbon as my Execters my Desire is they should not give any bonds but that at all times my Execters shall Consult My Brother M. H. Fitzgibbon of Carnegie in regards to all Properties whitch he is intrested in and act according to his Judgment in the Same I set my hand and seal The 10 Day of April, 1916.

William Fitzgibbon.

EXHIBIT H.

This Agreement made this 23rd day of March A. D. 1917, among Eleanor Fitzgibbon, Margaret V. Fitzgibbon and Francis Fitzgibbon Grote:

Whereas, it was the intention of our father, upon his death, to leave his estate to us to be and remain intact

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for a period of ten (10) years after his death, and at the end of said period to go to the survivors or survivor of us who are his only heirs at law:

Now Therefore this Agreement Witnesseth: That we do hereby mutually agree and declare that all of the estate of our said father, with the exception of the insurance funds, which we have already divided and disposed of, shall remain intact for the period of ten (10) years, from the date of our father's death. That we shall receive the income therefrom and that we take and hold said estate as tenants in common with right of survivorship.

Witness our hands and seals this 23d day of March, A. D. 1917.

(Signed) Francis Fitzgibbon Grote (Seal)

(Signed) Eleanor Fitzgibbon (Seal)

(Signed) Margaret V. Fitzgibbon (Seal)

Other facts appear by the opinion of the Supreme Court.

Exceptions to the adjudication were dismissed. TRIMBLE, J., dissented. Gertrude G. Fitzgibbon, testator's wife, appealed in No. 140.

Eleanor Fitzgibbon appealed in No. 141.

Margaret V. Fitzgibbon appealed in No. 142 and Eleanor and Margaret V. Fitzgibbon appealed in No. 163.

Errors assigned, inter alia, were decrees dismissing exceptions to adjudication.

Allan Davis, of *Duff, Marshall & Davis*, for appellants.—The daughters had the right to make the agreement: *McCoy v. Niblick*, 228 Pa. 342; *Windolph v. Trust Co.*, 245 Pa. 349.

If, for any reason, the agreement should be held invalid, even then Grote had no standing, because the will vests the general estate in the survivor, and Mrs. Grote is dead.

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Arguments.

The presumption in the law is that testator intended to dispose of his entire estate and not to die intestate: Phillips's Est., 205 Pa. 504; Lloyd's Est., 188 Pa. 451; Ferry's App., 102 Pa. 207; Long v. Hill, 29 Pa. Superior Ct. 606.

The will refers to any daughter's demise and not to her demise or death without issue or without children. In case of the death of one, her share shall go to the other two; and in case of the death of the second, to the last one left living of the three. The estate created by these words could not possibly last longer than the lives of any of the two daughters who should die leaving one to survive them: Buchanan's App., 72 Pa. 448; Irwin v. Covodo, 24 Pa. 162; Ballenger's Est., 19 Pa. Superior Ct. 199; McKeever v. Patteson, 2 Pa. C. C. R. 304; Rowland's Est., 141 Pa. 553; Black v. Woods, 213 Pa. 583.

Where the gift to the survivors is preceded by a particular estate for life or years, words of survivorship, in the absence of anything indicating a contrary intention, shall refer to the termination of the life estate: Woelper's App., 126 Pa. 562; Breese's Est., 32 W. N. C. 166; Patrick's Est., 162 Pa. 175.

James T. Buchanan, with him *Hermann L. Grote* and *Frederick C. Grote*, for appellee.—The general rule is that the words "survivor" or "surviving," following a prior gift, are understood as referring to the death of testator, unless a contrary intention is apparent: Fetrow's Est., 259 Pa. 89; Worst v. De Haven, 262 Pa. 39; Marshall's Est., 262 Pa. 145; Stark's Est., 264 Pa. 232; Jennings's Est., 266 Pa. 60; Frisbie's Est., 266 Pa. 574; Groninger's Est., 268 Pa. 184.

Testator did not die intestate as to any part of his estate, but it all passes under his will: Long's Est., 228 Pa. 594; Reisher's Est., 261 Pa. 223.

The marital rights of a husband in his wife's estate stand upon a higher plane than that of any other heir

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to her estate. His wife cannot deprive him of these rights without his consent: *Thornton v. Kreeps*, 37 Pa. 391.

The agreement is not a valid transfer and assignment of Mrs. Grote's interest, sufficient to divest her vested interest: *Benkhart v. Com. Tr. Co.*, 269 Pa. 257; *Win-dolph v. Trust Co.*, 245 Pa. 349.

OPINION BY MR. JUSTICE SCHAFER, January 3, 1922:

These appeals are from a decree of distribution in the estate of William Fitzgibbon; much testimony was taken on the hearings, but, as we view the vital questions at issue, almost all of it is without any bearing on them, and can be disregarded, because what is involved is the construction of two papers, the will of William Fitzgibbon, and an agreement executed after his death by his three children. These papers speak their own meaning, without extraneous aid, except in one particular, to which we will advert hereafter.

Testator, as his will, which he wrote himself, discloses, was deficient in education; he had accumulated a considerable fortune; his family consisted of his wife, Gertrude, who elected to take against the will, and three daughters, Eleanor, Margaret and Frances, the latter prior to her father's death having married Ludwig I. Grote. These three daughters were the objects of testator's bounty, to them he intended to give all he possessed; no other person is mentioned in the will as being entitled to take anything thereunder, not even his wife.

The first direction was "My estate shall be kept intact at least for ten years unless my wife should get married again in that event the estate shall be settled up and divided." His wife still remains his widow. He named his three daughters as executrices; his evident purpose was that his entire estate should remain intact in their hands for at least the period indicated. His second direction was expressed thus, "but any moneys given to my daughters or set aside for them and its earnings

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shall not be charged up against them [as part of his estate] in settling my estate this is to be in place of insurance which I should of [have] carried for them and which my personal book will show the amounts and places deposited in which amounts *they shall share and share alike.*" Testimony showed that testator had on deposit in four banks sums in excess of \$175,000 and that in the book,—designated by the will and by him in his lifetime as his personal book, and in which these deposit accounts appeared,—there was written, over each account, in the handwriting of the testator, the words "custodian for Ellener & Francis and Margaret Fitzgibbon." The orphans' court properly held the money in these accounts constituted a fund, accumulated by the father, which was to take the place of life insurance for his three daughters and which was not considered by him part of his estate, that it need not be accounted for as part thereof, there being no debts to be taken care of, and especially so, as this money had been distributed and paid out by the managing and accounting executor, the daughter, Eleanor, to herself, and her two sisters as insurance, with the full acquiescence of the mother.

As to the so-called insurance money, the majority of the orphans' court held that the language of the will which follows mention of it, "in case of either one of the three daughters demise then her share shall revert to the other two and so on to the last one left living of the three," refers to that particular fund; the minority of the court did not so hold nor can we. These words refer, not to the insurance money (which in the testator's mind was no part of his estate, and which was to be divided among his daughters share and share alike), but to his "estate" which he had directed should be "kept intact for at least ten years." To link up the words "in case of either one of the three daughters demise then her share shall revert to the other two and so on to the last one left living of the three," with the pro-

vision for keeping his estate intact for at least ten years, works out a harmonious scheme for his entire will, which cannot be done if the language in question is tied to the insurance money provision. He contemplated that his daughters were to immediately receive this money, "and moneys given to my daughters or set aside for them.....shall not be charged up against them in settling my estate." He thought of it and spoke of it as insurance, which would be presently payable to them at his death, and directed that in it "they should share and share alike." The subsequent words, creating a survivorship right in the last living daughter, could not apply to this so-called insurance money presently given, not to be charged against them because received, and to be shared equally, without doing violence to his whole insurance plan, whereas, if applied to his property other than the insurance fund, they fit into his scheme of keeping his estate intact for ten years, most aptly and logically.

If the words relative to the death of the daughters be applied to the insurance money, no provision is made in the will for either the division of the estate or its vesting; and the testator must be held to have died intestate as to all the rest of his property, constituting far the larger part of his possessions. That construction of a will is favored which avoids an intestacy: Phillips's Est. (No. 1), 205 Pa. 504.

We therefore conclude that the insurance money belongs to the three daughters, that it was not impressed with any survivorship rights as between them; and the widow, who elected to take against the will, having acquiesced in its distribution to her children with full knowledge, has no claim to it.

One other matter involved in the construction of the will must be passed on before we come to the second paper in the case. It is argued that the provision in the will, relative to the death of the daughters, relates to their death in the lifetime of the testator. It cannot be so

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read and carry out the testator's intent; his first thought was to preserve his estate intact for ten years, and he is speaking of this period,—the provision as to the insurance money having been interpolated parenthetically into his main thought,—when he provides “in case of either one of the three daughters demise then her share shall revert to the other two and so on to the last one left living of the three.” His idea of ultimate disposition, was to the daughter or daughters living at the end of the ten-year period, provided his wife did not marry again.

We now come to the second, and in our view, so far as the pending controversy is concerned, controlling document in the case; about six months after the death of testator, the three daughters entered into this agreement. Margaret, the youngest, was not of age when she signed it; she, however, acknowledged and reaffirmed the writing after her majority. Neither the widow nor Ludwig I. Grote, husband of the daughter Frances, were parties to the agreement, but the former was fully informed of it, and approved it; the latter, although present in the room when the writing was signed, may not have known its contents.

This agreement, after reciting that it was the intention of their father to leave his estate to them, to remain intact for a period of ten years after his death, and, at the end of that period, to go to the survivor or survivors of the three daughters, provides, “We do hereby mutually agree and declare that all of the estate of our said father, with the exception of the insurance funds, which we have already divided and disposed of, shall remain intact for the period of ten years, from the date of our father's death. That we shall receive the income therefrom, and that we take and hold said estate as tenants in common with the right of survivorship.”

This was an agreement which the parties to it, including the married daughter, Mrs. Grote, had the right and power to enter into. Under our construction of the

will, the entire estate passed to them, subject to the widow's interest therein, resulting from her election to take against the will. The pending proceeding relates only to the distribution of personalty. Under the Married Woman's Property Act of June 8, 1893, P. L. 344, 3 Purd. Dig. 2449, the married daughter had the right to dispose of her personal estate, without the joinder of her husband, as absolutely as he could exercise dominion over his estate, except as the act limits her right to become accommodation endorser, maker, guarantor or surety for another. In the absence of fraud practiced upon her husband (and there is no allegation of fraud here), Frances Grote could dispose of her personal estate without his consent or joinder. "A wife has the same power of disposal of her personal estate during coverture that her husband has to his personal property, and she can create a valid trust of her separate personal estate without the joinder or consent of her husband.....Our legislation has changed her status as to her separate property and she now has the same right and power as an unmarried person to acquire, own, control, sell or otherwise dispose of her property, and may exercise the right and power in the same manner and to the same extent as an unmarried person.....With these exceptions [that she may not become an accommodation endorser, etc.] a married woman occupies the same relation to her property as an unmarried person, or as her husband to his property. In other words, saving the disabilities specified in the statute, her control over, and power of disposal of, her separate estate, are the same as if she was a feme sole. She may therefore dispose of her personal estate during coverture as she pleases. Her husband has no vested interest in her personal property during her lifetime. If done in good faith, and with the intention to divest herself of the ownership, she may sell her personal property, give it away, or make any other disposition of it she desires during her life, and he cannot complain, for

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the all-sufficient reason that he has no interest in the property. She is the owner and has absolute control over it, and hence in disposing of it during life she infringes no property or other right of her husband": *Windolph v. Girard Trust Co.*, 245 Pa. 349, 364.

By this agreement, translating into acts their understanding of their father's will, these three persons have fixed the terms under which they will hold the property which came to them from him. At present we are concerned only with the income from it, the ten-year period fixed by the will and agreement not having expired.

The construction of the majority of the orphans' court was that the clause of the will covering the contingency of the death of the daughters relates to the insurance money and not the estate, that as to the latter there is an intestacy, that the agreement was ineffective so far as it deprived Ludwig I. Grote of the interest which he would take as surviving spouse of Frances Grote; and distribution was directed to be made to her estate, of which he is executor, of the share she would take under the intestate law. As we have pointed out, we do not agree with this construction of the will nor with the effect given to the agreement. After the execution of the agreement by his wife, Ludwig I. Grote had no interest in the estate which she derived from her father, save, of course, that he would have to join her in the execution of deeds for real estate, which he did. As the result of the award to the estate of Frances Grote, exceptions were filed by the widow, Gertrude G. Fitzgibbons, the purpose of which was to assert her right to claim her share of the insurance money which has been distributed. The orphans' court found that she had estopped herself from claiming any part of this money. In this finding, we concur, and her appeal, No. 140, October Term, 1921, is dismissed. Likewise, following the award, Eleanor Fitzgibbon, Margaret V. Fitzgibbon, and Eleanor Fitzgibbon and Margaret V. Fitzgibbon jointly, appealed from the decree, contending that Ludwig I. Grote has no standing to

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make any claim through his wife on their father's estate. On these appeals, Nos. 141, 142 and 163, October Term, 1921, for the reasons heretofore given, the decree of distribution entered by the court below is reversed, with directions to the court to make distribution to the widow, Gertrude G. Fitzgibbon, in accordance with her election to take against the will, and to Eleanor Fitzgibbon and Margaret V. Fitzgibbon of the income in accordance with the terms of the agreement marked Exhibit H, the distribution of the balance of the corpus of the estate, after deducting the widow's share, to abide such time as under the terms of the agreement make its distribution proper, the costs to be paid out of the estate.

O'Maley, Appellant, v. Pugliese.

Mortgage—Judgment entered on bond—Opening judgment—Mistake in calculation of amount due—Control of judgment and execution—Payments—Assignment—Notice.

1. Where a warrant of attorney to confess judgment, in a bond accompanying a mortgage, contains no limit as to time, judgment may be entered thereon by the mortgagee without waiting for the maturity of the obligation, or default thereon; but such judgment and execution thereon remain within the control of the court.

2. The lien of the judgment relates back to that of the mortgage, and, in entering it, the mortgagee is acting within his rights, unless debarred therefrom by his fraudulent conduct, and that is primarily a question for the lower court.

3. In liquidating the damages upon such a judgment, any errors which result from miscalculation should be adjusted by the court below without opening the judgment; as should the right to, and extent of, attorney's commissions for collection.

4. Payments made to a mortgagee without notice of an assignment are valid.

Argued October 18, 1921. Appeal, No. 167, Oct. T., 1921, by plaintiff, from order of C. P. Allegheny Co., Oct. T., 1920, No. 483, making absolute rule to open

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judgment and from judgment on verdict for defendant, in case of James P. O'Maley, for use, etc., v. Sebastiano Pugliese. Before FRAZER, WALLING, SIMPSON, KEPHART and SCHAFER, JJ. Reversed.

Issue to determine validity of a confessed judgment, after making absolute rule to show cause why judgment should not be opened. Before REID, J.

The opinion of the Supreme Court states the facts.

Verdict and judgment for defendant: 69 Pitts. L. J. 549. Plaintiff appealed.

Errors assigned were (1) refusal of plaintiff's motion for judgment n. o. v., quoting order and exception, and (2) order making absolute rule to open judgment, quoting order and exception.

James F. Coyle, with him *Lawrence B. Hurst*, for appellant, cited: *Atkinson v. Walton*, 162 Pa. 219; *Malone v. R. R.*, 1 Clark 380; *Warwick Iron Co. v. Morton*, 148 Pa. 72.

Frank A. Ammon, for appellee, cited: *Meigs v. Tunncliffe*, 214 Pa. 495; *Lee v. Sallada*, 7 Pa. Superior Ct. 98.

OPINION BY MR. JUSTICE WALLING, January 3, 1922:

On October 3, 1919, James P. O'Maley conveyed certain real estate, situated on Boquet Street in Pittsburgh, to Sebastiano Pugliese and received in part payment a purchase-money bond and mortgage for \$4,400, payable \$50 a month, with certain provisions for payment of interest. On the same day, O'Maley entered the mortgage of record and, by endorsement on the margin thereof, assigned it to his brother, G. T. O'Maley, of Kansas City, Mo. The mortgagor paid the first eight monthly payments to the mortgagee, as they matured, in ignorance of the assignment, and thereafter, on May

27, 1920, conveyed the premises to Domenico Argenti-
tiere, subject to the mortgage debt. At that time the
assignment of the mortgage came to the knowledge of
Pugliese and Argenti-
tiere. Their attorney then repeat-
edly wrote to G. T. O'Maley with reference to the mort-
gage, but received no reply; and they contend James
P. O'Maley declined to recognize Argenti-
tiere as pur-
chaser of the property or to give them any satisfaction;
admittedly he refused the installments for June, July
and August, 1920, when tendered him on the 14th of the
latter month. Yet sixteen days later, James P. O'Maley,
having received a reassignment of the bond and mort-
gage, entered judgment upon the former for the penal
sum of \$8,800, and liquidated as the real debt the entire
unpaid balance, including interest, attorneys' commis-
sions, etc., and proceeded to take the land in execution.
This he did by virtue of a stipulation in the bond and
mortgage that in case of default as to any payment for
thirty days the entire debt should become due and pay-
able. However, on defendant's application, the execu-
tion was stayed by the court below, who thereafter made
an order opening the judgment and letting defendant in
to a defense. An issue was then framed and the case
went to trial before a jury, who made special findings to
the effect that the owners of the land in question were
able and willing to pay all installments as they matured
and were prevented from so doing by the fraud and mis-
conduct of James P. O'Maley, the mortgagee, and that
he acted in bad faith in declaring the default. Plain-
tiff's rule for judgment in his favor n. o. v. having been
discharged he brought this appeal.

The order opening the judgment must be set aside,
which will render abortive all proceedings subsequent
thereto: *Weigley v. Conrade*, 132 Pa. 147; *English's*
App., 119 Pa. 533. The judgment was confessed as pro-
vided in the bond, and, the warrant being without limit
as to time, it was not necessary to await the maturity of
the obligation (*Integrity Ins., etc., Co. v. Rau*, 153 Pa.

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488; *Valkenand v. Drum*, 143 Pa. 525); hence, the question of default was immaterial to the validity of the judgment, although the steps taken by defendant in the lower court seem to be based upon the opposite theory.

Payments made to a mortgagee without notice of an assignment are valid (*Foster v. Carson et ux.*, 159 Pa. 477; *Brindle v. McIlvaine*, 9 S. & R. 75; *Bury v. Hartman*, 4 S. & R. 175; *Lee v. Sallada*, 7 Pa. Superior Ct. 98); therefore, defendant is entitled to credit for the payments made James P. O'Maley while the mortgage stood in his brother's name. In fact, credit for such payments was given by James P. O'Maley in his liquidation. Errors if any in the liquidation which result from miscalculation should be adjusted by the court below without opening the judgment (*Saunders v. Martin*, 3 *Sadler* 346), as should the right to and extent of attorney's commissions for collection.

A confessed judgment remains within the control of the court, as does the execution issued thereon: see *Integrity Ins., etc., Co. v. Rau*, *supra*. The lien of this judgment, however, related back to that of the mortgage (*De Witt's App.*, 76 Pa. 283; *Hostetter's Petition*, 57 Pa. Superior Ct. 601; *Boyer v. Webber*, 22 Pa. Superior Ct. 35), and plaintiff was proceeding within his rights (*Robinson v. Loomis*, 51 Pa. 78) unless debarred therefrom by his fraudulent conduct (see *Atkinson v. Walton*, 162 Pa. 219), and that is primarily a question for the lower court, as to which we express no opinion.

The order making absolute the rule to open the judgment is reversed and all subsequent proceedings are set aside, and the rule is discharged but without prejudice to appellee's right to other relief; the cost on this appeal to be paid by him.

Young, Appellant, v. Thompson et al.

Mines and mining—Surface support—Right of action.

Where one person owns the surface, a second the mineral thereunder, and the third a right of support, the owner of the surface has no right of action for subsidence against the owner of the minerals.

Argued October 18, 1921. Appeal, No. 184, Oct. T., 1921, by plaintiff, from judgment of C. P. Allegheny Co., Oct. T., 1920, No. 797, n. o. v. for defendant, on verdict for plaintiff, in case of A. W. Young v. Robert Thompson et al. Before FRAZER, WALLING, SIMPSON, KEPHART and SCHAFER, JJ. Affirmed.

Trespass for injuries to surface by subsidence. Before MACFARLANE, J.

The opinion of the Supreme Court states the facts.

Verdict for plaintiff for \$2,250. Judgment for defendants n. o. v. Plaintiff appealed.

Error assigned, inter alia, was judgment, quoting it.

Hugh M. Stilley, with him *John M. Reed*, for appellant.

Sidney J. Watts, with him *Horace F. Baker*, for appellees, was not heard.

PER CURIAM, January 3, 1922:

This action was brought to recover damages for injury to real estate by subsidence of the surface caused by mining the underlying coal. The original owner of both the coal and surface first sold the coal without releasing his right to surface support; subsequently he sold the surface overlying the coal to the Pittsburgh & Castle Shannon Railway Co. Later, that company laid out the

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land in lots, plaintiff becoming the purchaser of two lots, each having a frontage of thirty feet on Bridge Street and a depth of 137 feet. The railway company's deeds for these lots contained a reservation of the underlying coal, with the right to mine and carry it away, "without liability on the part of said company or its assigns or employees to support the surface by leaving any portion of the coal thereunder." The title to the coal subsequently became vested in Thompson, one of the defendants, who leased the property to Fulton and Ruffner, the other defendants, to be mined. Plaintiff alleges that, as a result of mining operations by lessees, a subsidence occurred causing damage to both the surface of the lots and his dwelling. A verdict was rendered for plaintiff and later the court below entered judgment for defendant non obstante veredicto. Plaintiff appealed.

The facts here are almost identical with those before this court in *Charnetski v. Miners Mills Coal Mining Co.*, 270 Pa. 459. Here, as there, the testimony shows the existence of three estates in the land, viz: the surface, the coal and the right of support, and there, as here, each of these were vested in different persons at the same time. In this case plaintiff owns the surface, defendants the coal and the railway company the right of support; consequently, as plaintiff does not possess the right of support of his surface he is not in position to maintain this action. The court below properly entered judgment non obstante for defendant.

Judgment affirmed.

Stevenson v. Davis, Director General, Appellant.

Negligence—Railroads—Damages—Excessive verdict—Abuse of discretion—Act of May 20, 1891, P. L. 101—Review.

1. The amount of a verdict will not be disturbed by the appellate court, except in cases where so grossly excessive as to shock the

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sense of justice, and where the impropriety of allowing it to stand is so manifest as to show clear abuse of discretion of the court below in refusing to set aside.

2. A verdict of \$7,250 in favor of a practicing physician 69 years of age, will not be set aside where it appears his earnings had decreased since his injuries, from \$7 or \$10 to \$2.50 a day, and that his eyesight and memory had become impaired, as had also his general physical condition.

Argued October 19, 1921. Appeal, No. 185, Oct. T., 1921, by defendant, from judgment of C. P. Allegheny Co., July T., 1920, No. 2287, on verdict for plaintiff, in case of A. C. Stevenson v. James C. Davis, Director General of Railroads, agent operating the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Co. Before FRAZER, WALLING, SIMPSON, KEPHART and SCHAEFFER, JJ. Affirmed.

Trespass for personal injuries. Before HAYMAKER, J. The opinion of the Supreme Court states the facts.

Verdict for plaintiff; motion by defendant for new trial refused; and judgment for plaintiff for \$7,250. Defendant appealed.

Error assigned, inter alia, was refusal of new trial, quoting order.

Robert D. Dalzell, of Dalzell, Fisher & Dalzell, for appellant, cited: *Maloy v. Rosenbaum Co.*, 260 Pa. 466.

Thomas M. Marshall, Jr., with him *Thomas M. Marshall*, for appellee.

PER CURIAM, January 3, 1922:

Plaintiff, while a passenger on a car of the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, operated by the director general of railroads, was injured by a suit case or hand satchel falling from a rack above the seat in which he was sitting and striking him on the

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head. A verdict was rendered in his favor for \$7,250. The court below having refused a new trial, defendant appealed from the judgments entered on the verdict.

The statement of the question involved is "whether the size of the verdict for the injury suffered was manifestly too great and plainly the result of prejudice." We find nothing in the record indicating prejudice against defendant. As to whether or not the verdict is excessive, since the passage of the Act of May 20, 1891, P. L. 101, giving this court power to set aside verdicts deemed to be excessive, we have repeatedly said and uniformly held that the amount of a verdict would not be disturbed except in cases where so grossly excessive as to shock our sense of justice and where the impropriety of allowing it to stand is so manifest as to show clear abuse of discretion on the part of the court below in refusing to set it aside: *Scott v. American Express Co.*, 257 Pa. 25, 31. This rule was adhered to in the late case of *Scott v. Bergdoll*, 270 Pa. 324, 327. An examination of the evidence shows plaintiff was a practicing physician living in the Borough of Oakdale, Allegheny County, and at the time of the accident 69 years of age. There was evidence that he was rendered unconscious when struck by the suit case and as a result of the injury is now unable to practice his profession to the same extent as before the accident, his earnings having decreased from \$7 or \$10 a day to \$2.50 a day; that his eyesight and memory have become impaired as has also his general physical condition. In view of this testimony establishing the injury received by plaintiff and its effect upon him and the resultant decrease in the receipts from his professional calling, we cannot say the verdict is so excessive as to warrant our interference on that ground.

The judgment is affirmed.

Dollar Savings Fund & Trust Co., Exr., v. Pennsylvania Co., Appellant.

Negligence—Railroads—Master and servant—Assumption of risk—Knowledge of risk—Case for jury.

1. An employee must know the circumstances and appreciate the risk before he will be held to have assumed it.

2. In an action against a railroad company to recover damages for death of a yard brakeman employed by defendant, the case is for the jury, where the evidence shows that deceased was squeezed to death while walking between a car and a wall, on a siding where he had never been before, that he had not been warned that the place was a dangerous point, and that no warning signals had been given to him before the accident.

Argued October 19, 1921. Appeal, No. 201, Oct. T., 1921, by defendant, from judgment of C. P. Allegheny Co., April T., 1919, No. 2188, on verdict for plaintiff, in case of Dollar Savings Fund & Trust Company, Executor of William H. White, deceased, v. Pennsylvania Co. Before FRAZER, WALLING, SIMPSON, KEPHAET and SCHAFER, JJ. Affirmed.

Trespass under Federal Employers' Liability Act for death. Before HAYMAKER, J.

The opinion of the Supreme Court states the facts.

Verdict for plaintiff for \$8,000, on which judgment was entered for \$6,500. Defendant appealed.

Error assigned, inter alia, was refusal of motion for judgment n. o. v., quoting record.

Robert D. Dalzell, of Dalzell, Fisher & Dalzell, for appellant, cited: *Jacobs v. Ry.*, 241 U. S. 229; *Reed v. Director General*, 267 Pa. 86; *Curtis v. R. R.*, 267 Pa. 227; *Shea v. R. R.*, 267 Pa. 516.

Robbin B. Wolf, of *McCreery & Wolf*, for appellee, cited: *Schaefer v. Ice Co.*, 238 Pa. 367; *Falyk v. R. R.*, 256 Pa. 397; *Swartz v. Bergendahl-Knight Co.*, 259 Pa. 421; *Seaboard Air Line v. Horton*, 233 U. S. 492; *Texas & P. R. R. v. Swearingen*, 196 U. S. 51; *Eicher v. Lumber Co.*, 268 Pa. 589, and *Gila Val., G. N. & N. R. R. v. Hall*, 232 U. S. 94.

PER CURIAM, January 3, 1922:

Plaintiff's decedent, with others of the train crew of which he was a member, was engaged in shifting cars from a main track over a switch into an industrial plant and while so occupied received injury from which he died two hours later. A verdict was rendered in favor of plaintiff for \$8,000 which the court reduced to \$6,500. From judgment entered thereon defendant appealed.

The facts are practically undisputed and are as follows: Two cars, a gondola and box car, were detached from a train to be placed in the yard of an industrial plant. Running along the track of the switch was a wall or cribbing, about five feet high, constructed of railroad ties. At the end of the switch, adjoining the main track, was an open space of ten or twelve feet between the switch and the cribbing, this space gradually contracting until the apex of a curve in the track and cribbing was reached, at which point the two came quite close together. The testimony fails to fix the exact distance between them. In shifting the cars deceased, as was his duty, "threw a switch" located near the apex of the curve and while walking toward the final destination of the two cars was caught at the apex of the curve between the gondola car and the cribbing, as the car "bellied" toward the wall in rounding the curve, inflicting the injury which resulted in the death of appellee's decedent. Deceased had been in the employ of defendant company for thirty-five years, during which time he was engaged in clerical work, except the two weeks immediately preceding his death, when his employment was

with the yard crew as flagman. He had not been over this switch before the day of the accident. There was no warning sign of danger and he had not been warned that the curve was a dangerous point.

The statement of the question involved is, "Whether a yard workman assumed the risk when squeezed to death while walking in between a car and a wall on a siding where he never had been before and where there was no warning sign?" An employee must know the circumstances and appreciate the risk before he will be held to have assumed it. Here we have no evidence that deceased was aware that the middle of the car would swing toward the wall in rounding the curve, or that the open space at the curve would be decreased by the car's movement and made more hazardous than at other points along the cribbing or that the situation was so plainly observable that he must be presumed to have known his safety was jeopardized: *Swartz v. Bergendahl-Knight Co.*, 259 Pa. 421; *Texas Pacific R. R. v. Swearingen*, 196 U. S. 51. The question involved in this case was clearly for the jury and was submitted by the court below in a fair charge.

The judgment is affirmed.

Levy et al., Appellants, v. Seadler.

Practice, C. P.—Judgment on pleadings—Ejectment—Act of June 7, 1915, P. L. 887—Trusts and trustees—Statute of frauds—Act of April 22, 1856, P. L. 532—Evidence.

1. Under the Act of June 7, 1915, P. L. 887, after an action of ejectment is at issue, the court may grant a rule to show cause why judgment should not be entered upon the pleadings in favor of the defendant.

2. Such judgment will be entered, where plaintiffs have pleaded that defendant is a trustee under a parol trust, which cannot be proved because of the inhibition of the Act of April 22, 1856, P. L. 532.

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Argued October 19, 1921. Appeal, No. 200, Oct. T., 1921, by plaintiffs, from judgment of C. P. Allegheny Co., Jan. T., 1920, No. 2115, for defendant on the pleadings, in case of John Z. Levy et al. v. M. Seadler. Before FRAZER, WALLING, SIMPSON, KEPHART and SCHAFER, JJ. Affirmed.

Ejectment for land in Borough of Braddock.

Rule for judgment on pleadings.

The following opinion was filed by SWEARINGEN, J.:

This case is an action of ejectment for the recovery of "Lot or Block numbered Twenty-three (23) in the Ludin Plan of Lots, of record in the Recorder's Office of Allegheny County, in Plan Book Vol. 17, page 168." The parties had pleaded to issue. Whereupon the defendant moved the court for a rule to show cause why judgment should not be entered upon the pleadings in favor of the defendant, pursuant to the Act of June 7, 1915, P. L. 887. After hearing, the court, on February 23, 1919, granted the rule, to which the plaintiffs answered denying the right of the defendant to now raise a question of law.

The Act of 1915, after prescribing the pleadings in ejectment, provides that "The court may, on rule, enter such judgment on the pleadings, in favor of either party, as it may appear to the court the party is entitled to."

It will be observed that the statute fixes no time, within which the court may enter judgment "on rule." In fact, the court could not, until after the pleadings were complete, consider such a rule. We are of opinion that the court was entirely correct in granting the rule, at the time when that was done.

The defendant has suggested two reasons why the plaintiffs cannot recover a verdict, even if a trial be had. The first is that they have pleaded that the defendant is a trustee, under a parol trust, which cannot be proven because of the inhibition of the statute of frauds. The

second is that the action is barred by the statute of limitations.

The title is out of the Commonwealth and was vested in John Z. Levy on and before December 1, 1909. By their deed of that date, duly recorded, John Z. Levy and his (then) wife conveyed, inter alia, the land in dispute to M. Seadler in fee simple, with covenant of general warranty. M. Seadler and wife executed a deed of general warranty, dated August 14, 1911, for the land last described, to William J. Daly, in fee, which deed was given to John Z. Levy and was not delivered to Daly. On November 29, 1919, William J. Daly and wife executed and delivered to John Z. Levy and Esther Levy, his (second) wife, jointly a quitclaim deed for the land in dispute; and on December 9, 1919, both the deed from Seadler to Daly, dated August 14, 1911, and the quitclaim deed from Daly to Levy and his second wife, were recorded by Levy. By virtue of the two deeds last mentioned, the plaintiffs claim the land in dispute jointly, which is, of course, an estate by entireties. The defendant relies upon the said deed from John Z. Levy and his first wife to himself, dated December 1, 1909, which is absolute on its face; and upon his possession of the land.

The parties differ as to the purpose of the deed from the defendant to William J. Daly, dated August 14, 1911. But that is an issue of fact with which we are not here concerned. We note, however, in the quitclaim deed from Daly to the plaintiffs, a recital that "..... no delivery of the said deed [August 14, 1911] from M. Seadler and wife to William J. Daly has been made." If that be true, and the plaintiffs cannot contradict it because they accept the deed and rely upon it, then they have no legal title to the land in dispute. Daly could quitclaim them nothing, never having had any title himself. Realizing their difficulty, the plaintiffs have set up a trust in M. Seadler for the benefit of John Z. Levy, arising out of an oral agreement alleged to have been

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made at the time the land was conveyed to him by Levy, December 1, 1909. The language in which the trust is described in the pleadings of the plaintiffs is that the defendant took title upon trust, that he would hold "the land in trust for the plaintiff, John Z. Levy, his heirs or assigns, and would execute a proper deed or conveyance for the same at any time upon demand."

This is not an implied trust. There is no pretense that it arose by construction in equity. It did not arise by the purchase of land and payment therefor by one, and the taking of title in another; nor by purchase with trust funds and taking title in the name of the trustee; nor by failure of provisions in a will conveying title to executors, whereby a trust may arise in favor of the heir of the testator. Therefore, this is not a resulting trust. And the plaintiffs have not averred that any fraud was practiced, that any accident happened, or that any mistake was made. Consequently, this trust must be regarded as an express one, within the meaning of the 4th section of the Act of 1856, which is: "All declarations or creations of trusts or confidences of any lands, tenements or hereditaments, and all grants and assignments thereof shall be manifested by writing, signed by the party holding the title thereof, or by his last will in writing, or else to be void."

This act expressly makes void any trust of this character, unless the same be in writing, "signed by the party holding the title," and, necessarily, any other evidence thereof would be inadmissible at a trial. It is true the plaintiffs enumerated a number of acts and circumstances which they contend show the existence of the parol trust asserted. But of what value are these averments, when the statute declares a trust thus established void?

In the view we have taken of the situation of the plaintiffs, it is not necessary to discuss the second proposition of the defendant, viz: that the statute of limitations is a bar to a recovery by them. Besides, there is

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We therefore hold that the trust set up by the plaintiffs in the pleadings cannot be proven, because it is in parol and is in direct conflict with the statute of frauds.

And now, to wit, June 23, 1921: After argument and upon consideration, the rule is made absolute, and judgment upon the pleadings is hereby entered in favor of the defendant for the land described in the writ, together with costs.

Plaintiff appealed.

Error assigned was order, quoting it.

E. E. Fulmer, with him *James A. Wakefield*, for appellants, cited: *Sackett v. Spencer*, 65 Pa. 89; *Christy v. Brien*, 14 Pa. 248.

John C. Bane, with him *Lewis M. Alpern*, for appellee.

PER CURIAM, January 3, 1922:

This case is affirmed on the opinion of the learned judge of the court below, directing that judgment be entered in favor of defendant.

Williamson, Appellant, v. Dawson.

Equity—Accounting for profits—Purchase of coal lands—Joint owners—One party buying out the other—Signature to paper—Modification of paper—Notice—Trust and trustees—Constructive trust—Trustee ex maleficio.

1. Where two persons join together in the purchase of coal lands, and the first sells out his interest to the second, and thereafter the latter sells the whole estate in the lands at a profit to a person who had been previously negotiating for them at a price named, but had postponed acceptance, the second cannot compel

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his associate to account for half the profits, if it appears that he knew of the pending negotiations, and there is no evidence that, at the time he sold out, an agreement of sale had been made with the final purchaser.

2. Where, in an equity suit, it appears that plaintiff and defendant were about to enter into an agreement, and that defendant refused to sign a paper unless a change of a word was made therein, and thereupon caused the word to be changed in plaintiff's presence, and plaintiff subsequently caused the paper to be written in its original form, and plaintiff then signed it without being aware that a change had been made, plaintiff was bound to call the attention of defendant to the fact that he had presented a redrawn copy of the agreement in its original form, and, failing to do so, he could not ask a court of equity to assist him in taking advantage of defendant's mistake.

Argued October 24, 1921. Appeal, No. 182, Oct. T., 1921, by plaintiff, from decree of C. P. Washington Co., No. 2768, in Equity, dismissing bill in equity, in case of T. D. Williamson v. George W. Dawson, now by order of substitution Mayme M. Dawson, administratrix of George W. Dawson, deceased. Before MOSCHZISKEB, C. J., FRAZER, SIMPSON, KEPHART, SADLER and SCHAFER, JJ. Affirmed.

Bill in equity for accounting of profits. Before McILVAINE, P. J.

The opinion of the Supreme Court states the facts.
Bill dismissed. Plaintiff appealed.

Error assigned, inter alia, was decree, quoting it.

Sidney J. Watts, with him *A. T. Morgan*, for appellant.—As joint adventurers the parties stood in a confidential and fiduciary relation to each other, and, in negotiating for the interest of the other, each was obliged, not only to refrain from active fraud, but to inform the other of all facts necessary to enable the other to form a sound judgment of the value of his interest in the joint property: *Matthews v. Bliss*, 22 Pick. 48; *Mc-*

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Cutcheon v. Smith, 173 Pa. 101; Brooks v. Martin, 69 U. S. 70.

The parties to this case were engaged in a joint adventure and their rights and liabilities are to be governed by the law applying to that relationship, rather than by the law applying to tenants in common: Wright v. Cumpsty, 41 Pa. 102; McCutcheon v. Smith, 173 Pa. 101.

Rufus S. Marriner, of Wiley, Marriner & Wiley, for appellee: The cases cited do not apply to this case.

OPINION BY MR. JUSTICE FRAZER, January 3, 1922:

This proceeding in equity was begun for the purpose of compelling defendant to account to plaintiff for a share of the profit derived from the sale of coal property, located near Millsboro, Fayette County, which plaintiff and defendant bought together, each supplying one-half the consideration, plaintiff, previous to the sale, having conveyed to defendant his undivided half interest in the property. Plaintiff claimed a share in the profits of the sale, alleging in support of his claim that defendant concealed from him the fact that negotiations for the sale were pending previous to and at the time of the conveyance of plaintiff's interest to defendant. The bill asked that defendant be declared trustee of a mortgage, forming part of the consideration for the property, and that the court fix the exact amount of plaintiff's interest in the security. The court below dismissed the bill on the ground that plaintiff failed to prove facts necessary to create a constructive trust, or make defendant a trustee ex maleficio of the one-half interest in the land. Plaintiff appealed.

It appears from the findings of the court below, which are amply supported by the testimony, that plaintiff and defendant had for some time conducted negotiations with various persons for the sale of the property, among them Robert L. James, of the City of Pittsburgh, who

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expressed his willingness to purchase the entire property for the sum of \$36,000, saying, however, he was unable to do so until further developments were made in other mining properties he at the time owned. Plaintiff had knowledge of these negotiations and of the proposition made by James. In the meantime, and before James signified his intention to become the purchaser, a difference arose between plaintiff and defendant and, at a conference between them on February 2, 1920, defendant, on plaintiff's request for a proposition, stated he would give or take \$10,000, with accrued interest and taxes, for a half share in the property, to which plaintiff immediately replied, "You can have my interest on those terms." Defendant accepted plaintiff's offer and a check was drawn and delivered for \$500 and a receipt given, stating the payment was on account of the sale of plaintiff's interest in the property to defendant. The parties agreed to complete the transaction on the following day. The principal dispute shown by the testimony is as to what was said concerning a writing set forth in plaintiff's bill, signed by defendant, dated February 17, 1920, and containing the following provisions: "This is to certify that I, George W. Dawson have purchased all the undivided one-half interest in [here follows a description of the property and conditions]. The said sale being conditioned upon the representations of George W. Dawson to the said T. D. Williamson that he has not, prior to this date, sold said coal or entered into negotiations, either verbal or written, for the sale of said coal." Plaintiff testified he informed defendant at the first interview on February 2d, that, unless the latter signed a certificate of the character above recited, plaintiff would not sell. Defendant denied such statement was made at that time and said the request was first made the next day at the time fixed for settlement. Defendant then objected to the use of the word "negotiations" saying he considered the term too broad, the fact being that negotiations

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had previous to that time been pending for the sale of the property with a number of persons. He, accordingly, suggested the word "negotiations" be changed to "agreement" which was done by plaintiff's stenographer. A tender of the purchase money was made without the certificate and refused by plaintiff. Defendant declined to sign the paper until he had consulted his attorney and left plaintiff's office for that purpose, taking the paper with him. His attorney advised against signing the paper until he had secured a written statement from all parties who had been solicited to buy the property, to the effect that no agreement up to that time had been entered into, which was accordingly done. The parties again met on February 17th to complete the transaction and defendant produced the paper which had been corrected by changing the word "negotiations" to "agreement." In the interim, plaintiff prepared a new copy of the original paper in which he restored the word "negotiations" and laid it on the table with the deed to the premises. Defendant signed the newly prepared certificate without reading it believing it to be his own draft of the paper in which the word "negotiations" had been changed to "agreement," but which subsequently proved to be the rewritten one produced by plaintiff. Defendant's signature was witnessed by his attorney, who was not aware of the existence of the original paper containing the word "negotiations." Defendant having subsequently sold the property to James at the latter's original offer of \$36,000, plaintiff claimed a share of the profit realized, alleging that defendant concealed from him the fact that negotiations had been pending with the purchaser.

The testimony shows that James subsequently decided to carry out his original desire to purchase the property at the price named. There is no evidence that an agreement to that effect existed at the time plaintiff sold his interest to defendant. Although negotiations had been pending with James for some time, plaintiff knew of

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these efforts to sell to him and was aware that James expressed a desire to purchase the property at a future time at the price named. Plaintiff was, accordingly, not misled as to the existence of these negotiations and is not in a position to claim they were concealed from him. We are clearly of the opinion the court below was fully justified by the evidence in finding defendant signed the certificate believing it to be the one in which he had, in plaintiff's presence, caused the word "negotiations" to be erased and the word "agreement" to be substituted. Knowing this, plaintiff was bound to call the attention of defendant to the fact that he had presented a redrawn copy of the certificate in its original form and, failing to do so, cannot now ask a court of equity to assist him in taking advantage of defendant's mistake.

Under all the circumstances, the court below properly concluded that plaintiff failed to prove the facts necessary to entitle him to an accounting of the proceeds of sale of the property.

The decree of the court below is affirmed at plaintiff's costs.

Schmidt, Appellant, v. Musser et al.

Equity—Findings of fact—Evidence—Coal lease—Misrepresentations.

Findings of fact by a chancellor that there were no misrepresentations made by the lessor of coal as to the quality thereof, if based upon sufficient and competent testimony, have the weight of a verdict of a jury, and will not be disturbed, in the absence of manifest error.

Argued October 25, 1921. Appeal, No. 34, Oct. T., 1921, by plaintiff, from decree of C. P. Allegheny Co., Oct. T., 1919, No. 462, dismissing bill in equity, in case of Charles W. Schmidt v. William J. Musser and L. C.

Statement of Facts—Opinion of the Court. [272 Pa. Wick. Before MOSCHZISKE, C. J., FRAZER, SIMPSON, KEPHART, SADLER and SCHAEFFER, JJ. Affirmed.

Bill in equity to cancel coal lease. Before SWEARINGEN, J.

The opinion of the Supreme Court states the facts.

Bill dismissed. Plaintiff appealed.

Error assigned, inter alia, was above decree, quoting it.

Lawrence B. Cook, for appellant.

James L. Weldon, with him *Joseph F. Weis*, *Alexander P. Lindsay* and *David L. Starr*, for appellee.

OPINION BY MR. JUSTICE FRAZER, January 3, 1922:

Defendants assigned to the plaintiff, an experienced miner of coal, a lease of mining rights in a tract of land situate in the 19th Ward of the City of Pittsburgh, including a sale of mining equipment, for a total consideration of \$2,000, upon which plaintiff paid \$1,250 in cash and gave as security for the balance a mortgage of \$750, on a separate lot of ground adjacent to the coal property, payable \$250 in six months and the balance one year thereafter. Plaintiff went into possession of the property and began mining operations, expending \$970 in renewing the equipment and placing the mine in order; failing, however, to find coal in paying quantities, he ceased work and filed the present bill in equity alleging defendants falsely and fraudulently represented the land in question contained five to six acres of solid coal, and praying a cancellation of the contract and asking that defendants be ordered to return the consideration and reimburse plaintiff for the amount spent in preparing to remove the coal, and further that the mortgage of \$750 be satisfied of record. Defendants in their answers denied having made such representations

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as alleged in the bill and averred, on the contrary, they informed plaintiff they were not aware of the extent of the unmined coal in the land and advised him to examine the premises to satisfy himself of the amount contained in the property. The court below found the disputed questions of fact in favor of defendants and dismissed the bill, from which order plaintiff appealed.

The sole question raised is one of fact whether plaintiff was induced by false representation to execute the lease and, as the findings of the court below involve the credibility of witnesses and the weight to be given their testimony, such findings have the weight of a verdict of a jury and will not be disturbed if supported by evidence: *Shimer v. Aldine Trust Co.*, 264 Pa. 444; *Volk v. Volk*, 272 Pa. 378, [the next case], and cases there cited.

An examination of the testimony shows the conversation in which the false representations are alleged to have been made occurred between plaintiff and the two defendants at the office of one of the latter; that both denied making the representations alleged and testified plaintiff was informed of the exact situation at the mine, what had been done in the way of developing the property and inquired of him whether he had experience in coal mining and, on receiving an affirmative reply, suggested that he look over the property before purchasing. Both testified plaintiff was informed they were unable to fix the extent of the unmined coal, and that, after the latter had examined the property, as they suggested he should do, he expressed himself as being satisfied there was coal under the tract and purchased the lease. This testimony substantially as above indicated, supports the findings of fact of the court below, especially the 7th, which is not excepted to, that "Musser did not at any time represent to plaintiff that there were five acres of solid coal in the tract, or any other amount. Neither did Mr. Wick, the other defendant, at any time represent to the plaintiff that there were five acres of solid coal

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under the land." There is further testimony to the effect that neither defendants had experience in coal-mining operations, one being a real estate agent and the other engaged in the lumber business and that if the property contained five acres of solid coal, as plaintiff claimed defendants represented to him, the market value of the tract would exceed five times the consideration mentioned in the lease.

The judgment is affirmed at plaintiff's costs.

Volk v. Volk et al., Appellants.

Equity—Specific performance—Decree matter of grace—Discretion of court—Findings of fact—Trust relation—Fraud—Evidence.

1. The specific performance of a contract is within the discretion of the court below, it being a matter of grace, and not of right; and the findings of a chancellor thereon, if supported by evidence, have the weight of a verdict of a jury, and will not be reversed unless clear error appears on the record.

2. A decree for the specific performance of the sale of the real estate of a decedent to one of five heirs by the other four, will be sustained, where defendants offered evidence that plaintiff had occupied a position of confidence by reason of his having previously managed the land, and that he had made false statements as to value, but this evidence is contradicted and the court below found on sufficient evidence that plaintiff had not managed the land, and had made no false representations, and that the contract price approximated the market value of the land.

Argued October 25, 1921. Appeal, No. 169, Oct. T., 1921, by defendants, from decree of C. P. Allegheny Co., July T., 1920, No. 535, on bill in equity, in case of Bernard Volk, Jr., v. Charles Volk et al. Before MOSCHIZSKER, C. J., FRAZER, SIMPSON, KEPHART, SADLER and SCHAFFER, JJ. Affirmed.

Bill for specific performance. Before SWEARINGEN, J.

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The opinion of the Supreme Court states the facts.
Decree for plaintiff. Defendants appealed.

Error assigned, inter alia, was decree, quoting it.

Jerome A. Miller, of Chantler, McClung & Miller, for appellants, cited as to the confidential relation and its breach: Stepp v. Frampton, 179 Pa. 284; Longenecker v. Church, 200 Pa. 567; Freetly v. Barnhart, 51 Pa. 279; Friend v. Lamb, 152 Pa. 529; Reehling v. Byers, 94 Pa. 316; Graham v. Pancoast, 30 Pa. 89; Brown v. Pitcairn, 148 Pa. 387; Lynch's App., 97 Pa. 349; Thomas' Est., 36 Pa. Superior Ct. 186.

Henry G. Wasson, with him Robert F. Graham, for appellee, cited: Steinmeyer v. Siebert, 190 Pa. 471; Dilworth v. Kennedy, 201 Pa. 388; Guenther v. Kutz, 270 Pa. 144.

OPINION BY MR. JUSTICE FRAZER, January 3, 1922:

Plaintiff is one of five children of Bernard Volk, Sr., who died in 1902, leaving valuable real estate consisting of two separate properties, situate in the City of McKeesport, which he devised to his wife for life and on her death to his children in equal shares. The widow died in 1919, and, on January 14, 1920, plaintiff entered into an agreement with the other heirs to purchase both properties for the sum of \$100,000, agreeing to pay his brother and sisters \$20,000 each for their respective shares. One of the heirs executed the deed presented by plaintiff in accordance with the agreement; the others, however, refused to convey, whereupon plaintiff instituted these proceedings to compel specific performance of the contract. The court below entered a decree directing conveyance of the property to plaintiff and defendants appealed.

The defense raised by the answer is that plaintiff occupied a position of trust and confidence toward defend-

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ants by reason of his having been in management and control of the premises during the continuance of the life estate and that he falsely and fraudulently represented to defendants matters affecting the value of the land, thus inducing them to execute the contract of sale. It was also averred the actual value of the property was at least \$175,000. The court below found substantially as follows: Plaintiff was not agent for defendants with respect to the property and occupied no relation of trust or confidence toward any of them; he did not manage or control the estate except the premises at 5th and Locust streets which he occupied under a lease; the price of \$100,000 fixed by the contract was fair and reasonable and approximately the market value; plaintiff made no misrepresentations to defendants to induce them to enter into the contract and consequently its enforcement would not be inequitable. Under the established rule laid down in numerous cases, the specific enforcement of a contract is within the discretion of the court below, it being a matter of grace and not of right (*Freetly v. Barnhart*, 51 Pa. 279; *Friend v. Lamb*, 152 Pa. 529, 533) and the findings of the chancellor, if supported by evidence, have the weight of a verdict of a jury and will not be reversed by this court unless clear error appears in the record: *Steinmeyer v. Siebert*, 190 Pa. 471; *Kirk v. Kirker*, 270 Pa. 158. Accordingly, we need only consider whether there is sufficient evidence to support the conclusion reached by the court below.

As stated above, two properties are involved, one at 5th Avenue and Locust Street, the other at Ringgold and Locust streets. At the death of the life tenant, and for a considerable period previous to that time, plaintiff had been lessee of a part of the Ringgold and Locust streets property as a residence and in the conduct of an undertaking business. A portion of the same building was also occupied by one of the defendants as a dwelling and other parts were leased to tenants, while

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another of defendants was lessee of the property at 5th Avenue and Locust Street in which he conducted a retail liquor business.

Shortly after the mother's death a meeting of the heirs was held for the purpose of discussing the best manner of handling the estate. A second meeting was held in September at which the question of the value and sale of the properties was discussed and, following a suggestion then made, further action was deferred until information as to its value should be obtained. This meeting was attended by Clyde N. Shaw, a real estate agent, personally acquainted with all the parties and who acted in an advisory capacity for them and obtained the opinions of other real estate agents as to the value of the property. At a meeting held January 14, 1920, all the heirs being present, it was agreed the properties should be sold for the sum of \$100,000. An opportunity to purchase at this figure was given to each of the defendants before being submitted to plaintiff and each declined to purchase, whereupon plaintiff expressed a willingness to take the properties at the figure named and an agreement was subsequently drawn and executed providing for the delivery of a general warranty deed on or before February 15, 1920.

The false representations alleged to have been made by plaintiff to induce defendants to sign the agreement were to the effect that a financial panic was imminent which would tend to depreciate real estate values; that the war with Germany was not yet over and would be followed by another war; that the street railway would be removed from the street on which the properties abutted and increased taxes would follow. The evidence offered in support of these statements was contradicted by plaintiff and one of the defendants and by the witness Shaw. Under these circumstances, the court below was fully justified in its finding that no representations were made by plaintiff for the purpose of misleading defendants.

It is also argued that defendants were misled by the contents of a letter written to plaintiff by Shaw giving what purported to be the opinions of real estate experts as to the value of the properties but which, in fact, was the valuation they had placed upon but one of the two pieces. Shaw, as a witness, testified, however, that he had asked for a valuation on the "Volk Estate" property and had given such valuation in a letter which had been presented to and discussed at a meeting of all parties in interest and, so far as the testimony goes, we find nothing to indicate plaintiff had knowledge concerning the basis of the appraisement that was not also possessed by defendants, nor is there any testimony tending to indicate he concealed, or in any manner took advantage of, information he had personally acquired. Shaw did not represent plaintiff alone but all parties in interest and had advised each heir to procure an appraisement. The value of the property was fixed at \$5,000 in excess of the highest obtainable appraisement. If the estimate of value given by Shaw was based on a misapprehension of the full extent of the properties, all parties had equal means of knowledge, the question of value had frequently been discussed and there is ample testimony in the record to support the finding of the court below that the price fixed in the contract represented approximately the market value of the properties.

Appellants do not contend the family relationship existing between the heirs, or the fact that they were tenants in common, raised a presumption of a confidential relation which would place upon plaintiff the burden of showing affirmatively that the transaction was fair and open and that no deception was used by him (*Stepp v. Frampton*, 179 Pa. 284, 289); they, however, claim defendants relied on plaintiff's guidance because of his greater business experience and, knowing this, plaintiff took advantage of the trust and confidence reposed in him. Evidence was adduced to show that two of the sisters who are married and living with their hus-

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bands asked plaintiff to invest for them the proceeds of their interest, but beyond this there is no proof that plaintiff was the agent in handling the estate or represented his brother or any of his sisters in disposing of the property, or that he occupied toward them any relation other than that of tenant in common of property which they had mutually agreed to sell.

The decree of the court below is affirmed at the costs of defendants.

Star Drilling Machine Co. v. Richards, Appellant.

Contract—Sale—Payments—Inconsistent recoveries—Election of remedy—Principal and surety.

1. Where a contract provides that payments for merchandise delivered shall be made from time to time, the title thereto to remain in the payee until a certain amount has been paid, and the latter thereafter retakes possession of the property, his right to receive future payments at once ceases.

2. This rule is applicable though suit to recover the payments was begun before the property was taken by the payee.

3. A litigant who is entitled to either one of two inconsistent recoveries, cannot by his order of procedure obtain the right to both.

4. He who elects to disaffirm a contract, and acts upon his election, cannot afterwards affirm it to the injury of another; this is particularly true where the latter is a surety.

Argued October 18, 1921. Appeal, No. 165, Oct. T., 1921, by defendant, from judgment of C. P. Allegheny Co., Oct. T., 1920, No. 508, on verdict for plaintiff, in case of Star Drilling Machine Co. v. H. E. Richards. Before FRAZER, WALLING, SIMPSON, KEPHART and SCHAFFER, JJ. Reversed.

Assumpsit on promissory note. Before CARPENTER, J. The opinion of the Supreme Court states the facts.

Verdict and judgment for plaintiff for \$2,942.17. Defendant appealed.

Assignments of Error—Opinion of the Court. [272 Pa.

Errors assigned, among others, were (1) refusal of binding instructions for defendant, and (3) refusal of judgment for defendant n. o. v., quoting record.

John A. Metz, with him *W. C. McClure*, for appellant, cited: *Seanor & Bierer v. McLaughlin*, 165 Pa. 150; *Kelley Springfield Road Roller Co. v. Schlimme*, 220 Pa. 413; *Howard v. Stillwagon*, 232 Pa. 625; *Ketcham v. Davis*, 31 Pa. Superior Ct. 583.

W. E. Minor, for appellee, cited: *Seanor & Bierer v. McLaughlin*, 165 Pa. 156; *Ketcham v. Davis*, 31 Pa. Superior Ct. 583.

OPINION BY MR. JUSTICE SIMPSON, January 3, 1922:

Plaintiffs leased to three persons, trading as the West Penn Drilling Company, certain machinery, for which the firm agreed to pay part in cash and the balance in installments; the agreement further providing that, if default was made as to any of the payments, plaintiffs "might repossess themselves of [the machinery] without process of law, or let or hindrance from the bailee, as though these presents had never been made,..... and whenever such payments shall amount to the sum above stated, the bailee.....may elect to become the owner of the personal property described in this agreement." The cash payment was made; to secure one of the installments, the note in suit was given, defendant being an endorser thereon; and the machinery was thereupon delivered to the partnership. Because later payments were not made, the note was protested, this suit was brought, and thereafter plaintiffs took possession of the machinery and re-leased it to one of the partners. At the trial a verdict was directed for plaintiffs, defendant's point for binding instructions was refused, thereafter his motion for judgment non obstante veredicto was dismissed, and because of this action he appealed from the judgment entered on the verdict.

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The only question we need consider is whether or not the retaking of the machinery operated to relieve defendant from liability on his endorsement. The court below held this would have been the effect if it had been taken by plaintiffs before suit was brought, but, since the fact was otherwise, a different result obtained. We know of no principle or authority which sustains this supposed distinction. It would be a sad reflection on any system of jurisprudence, if it permitted a litigant, who was entitled to either one of two inconsistent recoveries, but not to both, to ultimately obtain both, merely by his order of procedure in relation to the matter. "Equity, which is part of the common law of Pennsylvania, never would permit liability to depend upon the option of one party to a controversy, instead of upon legal principles applicable to all concerned": *Union National Bank v. Farmers and Mechanics National Bank*, 271 Pa. 107. It was probably for this reason the distinction suggested by the court below was correctly ignored, under similar circumstances, in *Ketcham v. Davis*, 31 Pa. Superior Ct. 583.

It is not necessary to consider under what circumstances the election to affirm would conclude the parties to the agreement of purchase, since defendant was not one of them and was powerless to prevent the rescission of the contract and the retaking of the machinery. Plaintiffs chose to take it and the partnership chose to assent thereto, and defendant, who is only a surety, whether considered as an endorser for value or for accommodation, has, therefore, the right to set up this defense, which arose because the contract was rescinded.

Nor is it necessary to quote at length from the many authorities which sustain his contention. Among them are *Campbell Printing Press and Manufacturing Co. v. Hickok*, 140 Pa. 290, *Seanor v. McLaughlin*, 165 Pa. 150, and *Kelley-Springfield Road Roller Co. v. Schlimage*, 220 Pa. 413; in the first of which it was said that where, as here, the agreement provides the lessors

"might repossess themselves of [the machinery] as though these presents had never been made," the only possible conclusion is that "if the agreement 'had never been made,' the note would not have been given; when the agreement is rescinded, with like effect as if it 'had never been made,' the note fell with it for want of consideration."

We have not overlooked the claim that defendant agreed to pay the amount of this note and charge it against the contract price to be paid the partnership for drilling the well with this machinery; if there was such an agreement, plaintiffs were not parties to it, and hence cannot be damnified by any breach thereof.

The judgment of the court below is reversed and judgment is here entered for defendant non obstante veredicto.

William Zoller Co. v. Hartford Fire Insurance Co., Appellant.

Insurance—Live stock insurance—Loss of hogs by carrier—Proofs of loss—Waiver—Evidence—Stockyard books—Best evidence—Identification of handwriting—Bill of lading—Acceptance of limited bill of lading.

1. In an action on a policy of live stock insurance, there is sufficient evidence of waiver of proofs of loss, where it appears defendant had actual notice of the damage to the shipment of the animals insured within the time required for filing proofs of loss, and that thereafter defendant's authorized agent wrote a letter to plaintiff on the subject without therein denying liability on the ground that formal proofs of loss had not been furnished, but denying liability on other grounds.

2. If an insured, in good faith and within the time stipulated, does what he plainly intends as a compliance with the requirements of the policy as to proofs of loss, good faith equally requires that the company shall promptly notify him of their objections.

3. As the law always seeks the best evidence, so, when new and more certain methods of ascertainment and proof arise, the law, moving forward with and accommodating itself to the trade cus-

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toms of the age it is serving, will make use of those means, which trade itself has developed, as an aid to certainty in recording transactions as they occur.

4. In an action against an insurance company to recover for loss of live stock, books of a stockyard association are admissible for the purpose of showing the condition of the animals when received at the yard, as such books are, under modern conditions, although contrary to the earlier rule, the best evidence.

5. If, in such case the entries were made by a clerk beyond the jurisdiction of the court, his handwriting may be identified by the traffic manager of the association.

6. Where live stock policies provide for "clear" bills of lading, and the insured accepts bills on which are stamped the words "accepted subject to delay on account of weather conditions," the insurance company cannot defend against a loss by setting up such variance between the policy and the bills of lading, where there is no proof of delay in shipment from weather conditions or other causes.

7. If the injury was due to the negligence of the carrier, and the effect of the stipulation was to waive the right of recovery for negligence, the limitation of its liability was, under the law of Pennsylvania, not enforceable by the carrier against the shipper, and, if it did not cover the loss from the carrier's negligence, the insurance company was not injured by it.

Practice, C. P.—Affidavit of defense—Trial—Questions not raised by affidavit of defense—Act of May 14, 1915, P. L. 483.

8. Under the Act of May 14, 1915, P. L. 483, a defense not set forth in the affidavit of defense, cannot be raised at the trial.

Appeals—Charge and points—Filing of record—Assignments of error.

9. Where an appellant has not asked that the charge and the points with their answers be written out and filed of record, they are not available for assignments of error.

Argued October 18, 1921. Appeal, No. 183, Oct. T., 1921, by defendant, from judgment of C. P. Allegheny Co., Jan. T., 1919, No. 981, on verdict for plaintiff, in case of William Zoller Co. v. Hartford Fire Insurance Co. Before FRAZER, WALLING, SIMPSON, KEPHART and SCHAEFFER, JJ. Affirmed.

Verdict—Opinion of the Court. [272 Pa.

Assumpsit on policies of live stock insurance. Before
FORD, J.

The opinion of the Supreme Court states the facts.

Verdict and judgment for plaintiff for \$2,290.62. De-
fendant appealed.

Errors assigned were various rulings and instructions
sufficiently appearing by the opinion of the Supreme
Court, quoting record.

John M. Haverty, for appellant.—The stockyard books
were inadmissible: *Liverpool, etc., Ins. Co. v. Kearney*,
180 U. S. 132.

There was not sufficient evidence of a waiver: *Kear-
ney v. Ins. Co.*, 67 Pa. Superior Ct. 179; *Edelson v. Ins.
Co.*, 59 Pa. Superior Ct. 379; *Dunn v. Ins. Co.*, 34 Pa.
Superior Ct. 245.

If the insured destroys the insurer's right of subro-
gation against the party causing the loss, he cannot re-
cover against the insurance company: *Roos v. R. R.*,
199 Pa. 378.

Frank Thomson, of *Thomson & Bradshaw*, for appel-
lee, was not heard.

OPINION BY MR. JUSTICE SCHAFFER, January 3, 1922:

This is an action on four policies of insurance, issued
by defendant to plaintiff, covering hogs, the property
of the latter, and shipped to him at Pittsburgh from St.
Louis. On arrival of the hogs at destination, it was
ascertained a number of them were dead and others
crippled. Claim was made by the insured to the insur-
ance company for the loss suffered, liability was denied,
suit was brought and recovery had for the full amount
claimed; from the judgment entered on the verdict
comes this appeal.

Appellant presents these propositions challenging
plaintiff's right to recover: (1) No proofs of loss were

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furnished as required by the policies, and there was no sufficient evidence to show a waiver of the requirement that they should be furnished. (2) It was error to admit books of the Pittsburgh Union Stockyards showing the condition of the hogs when received there for the purpose of establishing plaintiff's loss. (3) The policies providing for "clear" bills of lading, and plaintiff having permitted extra conditions to be added to them, this rendered the policies void.

Whilst it is true no formal proofs of loss were furnished, and the policies did provide for their submission to the company within twenty days after loss, yet it is undisputed that, a few days after the arrival of the shipments at Pittsburgh, invoices were sent by plaintiff to defendant showing the number of the dead and crippled hogs, together with their average weight, and a statement of the amount of loss claimed. In addition to this, about thirty days after the loss was ascertained, the superintendent of claims of defendant called on plaintiff, and requested copies of the bills of lading, which were furnished; later, the same official wrote a letter to the insured, referring to his visit, in which he said "at which time you handed me certain papers in support of your bills against this company." In this communication, no mention was made of the failure to furnish proofs of loss, and liability was denied, not on that ground, but because of the special stipulation as to delays in transit, written by the carrier into the bills of lading.

There can be no question of the full knowledge by the insurance company of the loss well within the twenty days, that it investigated and made no denial the loss had been sustained; nor did defendant question the amount claimed. It also appeared by the letter referred to that, within the twenty days, plaintiff had endorsed, and turned over to defendant, checks drawn to plaintiff's order by a bank in Indianapolis covering the amount received from the sale of dead and crippled

hogs, removed from cars at that point. These checks had been held by defendant from February 2d to the date of the letter, May 8th; and, when the insurance company repudiated its liability, they were returned to plaintiff, in order that it might realize on them. Appellant's conduct, after ascertaining there had been a loss, and the position assumed in the letter referred to, constitute a waiver of the requirement of the policies that formal proofs of loss should be furnished within a stipulated time. "If the insured, in good faith, and within the stipulated time, does what he plainly intends as a compliance with the requirements of his policy, good faith equally requires that the company shall promptly notify him of their objections, so as to give him the opportunity to obviate them; and mere silence may so mislead him to his disadvantage, to suppose the company satisfied, as to be of itself sufficient evidence of waiver by estoppel": *Gould v. Dwelling-House Ins. Co.*, 134 Pa. 570, 588; *Weisberger v. Western Reserve Ins. Co.*, 250 Pa. 155.

Was it error to admit in evidence, on plaintiff's offer, the books of the Pittsburgh Union Stockyards, showing the condition of the hogs when received there? It was testified, by the traffic manager and yardmaster of the stockyards, that a record is kept of the car number of every car from which stock is unloaded, the number of animals discharged from it, whether dead or alive, and whether anything appears to be wrong with them. Testimony was received, from clerks who made the entries, and from the traffic manager, after identifying the handwriting of a clerk, who was beyond the jurisdiction of the court, as to the number of hogs shown by the books to be dead in the cars on their arrival and the number found crippled, for the purpose of establishing plaintiff's loss. It is argued that this evidence was incompetent. The general rule is that a person's books of account cannot be used as evidence upon issues between third persons; that entries in such books as to such

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third persons are *res inter alios acta*, and cannot be used against persons not parties to them (53 L. R. A. 513, note), but, stating the exceptions to this rule and summing up the cases, it is said, "Books of carriers, such as railroad companies and express companies, are admissible in evidence, on issues between third persons, on the principle that entries made in the course of business, which it is the duty of the carrier to make, are competent evidence": 53 L. R. A. 530 (note), and cases cited.

While the earlier rule denied the admissibility of books of account, in issues between third persons, the modern tendency is to widen the door to their admission. This grows out of the magnitude and complication of modern business. No longer does the owner of hogs personally drive them to market; whether they have arrived at their destination in most instances cannot be known to him, he can only show they did or did not, by some such agency of transportation as that summoned here, a railroad stockyard, into which go livestock shipments consigned to great centers of population; their books are not alone the only evidence which is available to show delivery and condition when received, but in these days they are usually the best available evidence of such facts. As the law always seeks the best evidence, so, when new and more certain methods of ascertainment and proof arise, the law, moving forward with and accommodating itself to the trade customs of the age it is serving, will make use of those means, which trade itself has developed, as an aid to certainty in recording transactions as they occur.

Pennsylvania has recognized the need of easier methods of proof than the common law afforded, as to matters in which carriers are concerned, and, by the Act of May 25, 1897, P. L. 82, 1 Stewart's Purdon 619, has provided that, in suits brought in the courts of the Commonwealth, in which accounts kept by common carriers, and certain other public corporations, are involved, on

the trial of an issue between other parties, in the result of which the corporation has no direct or pecuniary interest, a copy of the books of account of the corporation, under the oath of an officer or employee in charge of them, filed within ten days of the date of trial, shall be prima facie evidence, and the books themselves need not be produced, except upon allegation of errors or omissions. This is a legislative recognition of the propriety of proof of the kind received in this case. The books of the stockyard were properly admitted, and proof of some of the entries therein, made by a clerk beyond the jurisdiction, by proof of his handwriting, was in accord with authority: *Alter v. Berghaus*, 8 Watts 77.

We now come to the last question which the record raises: The policies providing for "clear" bills of lading, and plaintiff having permitted extra conditions to be added to them, did this render the policies void? By a "clear" bill of lading, as we understand it, is meant, the uniform livestock shipment form thereof without superadded conditions. Across the face of the bills of lading, covering the shipments in this case, was stamped, "Accepted subject to delay on account of extreme weather conditions," or words of equivalent meaning. There is no proof that defendant had notice of this condition, inserted in the contract of carriage, before it issued its policies, but it is most significant that, in its policies it has the car numbers, as given in these documents, as well as the lines of railroad over which the shipments were to be made as appearing therein; however this may be, and whether the defendant had notice of the added condition or not, there was no proof of any delay in shipment from weather conditions or other causes. It might be sufficient to point out, to answer the contention now made, that no such defense as that set up, covering additional conditions to the bills of lading, appears in the affidavit of defense, and this defense was therefore not available to defendant. "Neither party shall be permitted at the trial to make any defense which is not

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set forth in the affidavit of defense, or plaintiff's reply, as the case may be, except as provided in sections seven and thirteen": Act May 14, 1915, P. L. 483, 6 Stewart's Purdon 7137. Furthermore, the assignments of error, which raise the question we are now considering, are to a part of the charge and the answer to a point submitted by defendant; as appellant did not ask that the charge and the points with their answers should be written out and filed of record, they are not available for assignments of error: *Ward v. Babbitt*, 270 Pa. 370. Under the established public policy in Pennsylvania, if the injury and death of the hogs were due to the negligence of the carrier, and the effect of the additional stipulation, put upon the bills of lading, was to waive the right of recovery for negligence, the limitation of its liability was not enforceable by the carrier against the shipper, and, if it did not cover loss from the carrier's negligence, the insurance company was not injured by it, and has no ground of complaint. What would have been the status of the parties now before us, had it been shown the loss was occasioned by delays, on account of extreme weather conditions, or from other causes, we are not called upon to determine. On the facts appearing, there is no merit in appellant's position that it is relieved from liability because of the clause stamped on the bills of lading.

We have considered all questions which appellant has raised; on none of them do we agree with its contentions. The assignments of error are overruled and the judgment is affirmed.

Gillespie et ux. v. Pennsylvania Co., Appellant.

Negligence—Affidavit of defense—Facts not denied admitted—Practice, C. P.—Act of May 14, 1915, P. L. 483—Evidence—Damages—Contributory negligence.

1. Under sections 6 and 13 of the Practice Act of May 14, 1915, P. L. 483, where no affidavit of defense has been filed to a state-

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ment of claim which avers injury or death by the negligent act of the defendant, the plaintiff need not prove whose negligence was the cause thereof, and defendant will not be permitted to contest that question; but the proofs must show that the injury or death resulted from actual negligence of the character averred in the statement of claim, that plaintiff was damnified by reason thereof, and the extent of his damage.

2. Since the act does not deal with the subject of contributory negligence, all matters relating thereto, whether substantive or procedural, remain unaffected by its passage.

Argued October 19, 1921. Appeal, No. 186, Oct. T., 1921, by defendant, from judgment of C. P. Allegheny Co., July T., 1918, No. 1915, on verdict for plaintiffs, in case of Thomas Gillespie et ux. v. Pennsylvania Co. Before FRAZER, WALLING, SIMPSON, KEPHAET and SCHAFFER, JJ. Affirmed.

Trespass for death of plaintiffs' son. Before FORD, J. The opinion of the Supreme Court states the facts.

Verdict and judgment for plaintiffs for \$5,000. Defendant appealed.

Error assigned, inter alia, was refusal of defendant's motion for judgment n. o. v., quoting record.

Robert D. Dalzell, of *Dalzell, Fisher & Dalzell*, for appellant.

R. P. Marshall and *M. R. Marshall*, for appellee, not heard.

OPINION BY MR. JUSTICE SIMPSON, January 3, 1922:

Plaintiffs sued to recover damages for the death of their son, alleging, in their statement of claim, that the defendant "operated trains over tracks across Spruce Street" in the City of Pittsburgh, and while decedent was walking along that street "the servants of the defendant, in the performance of their duties, so negli-

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gently operated an engine and cars on one of said tracks crossing said Spruce Street, that the cars struck [the boy] and dragged him and killed him." No affidavit of defense was filed.

At the trial, after the introduction of testimony tending to show negligence resulting in the death, the foregoing extract from the statement of claim was offered in evidence, for the purpose of charging defendant therewith, and was admitted without objection, a verdict was rendered for plaintiffs and, from the judgment entered thereon, defendant appeals, asking us to determine only: "Whether it is sufficient to fasten liability upon a defendant in an action of trespass, to offer an averment of the statement of claim that defendant's train was the instrumentality, when the testimony shows that a train in the position described by plaintiffs could not have been defendant's?" Taken literally, we would be compelled to say this would not be sufficient, but the point to be considered is not exactly as stated, it simply is: Given the fact that the proofs were sufficient to enable a jury to find defendant was killed by the negligent operation of some train, does the foregoing averment of the statement of claim, unanswered by an affidavit of defense, operate as an admission it was defendant's train? Thus stated there would seem to be no room for substantial dispute.

By section 6 of the Practice Act of May 14, 1915, P. L. 483-4, it is provided: "Every allegation of fact in the plaintiff's statement of claim.....if not denied specifically or by necessary implication in the affidavit of defense.....shall be taken as admitted,.....except as provided in section 13," and in certain other specific exceptions having no relevancy here. Section 13 provides: "In actions of trespass the averments, in the statement, of the person by whom the act was committed, the agency or employment of such person, the ownership or possession of the vehicle, machinery, property or instrumentality involved, and all similar averments, if

not denied, shall be taken to be admitted in accordance with section six; the averments of the other facts on which plaintiff relies to establish liability, and averments relating to damages claimed or their amount, need not be answered or denied, but shall be deemed to be put in issue in all cases unless expressly admitted."

It is clear, if these sections are to be given any effect in this case, it must be taken as admitted that "the servants of the defendant, in the performance of their duties, so negligently operated an engine and cars. . . . that the cars struck" decedent and killed him.

Under the act, those cars were "the vehicle, machinery, property or instrumentality involved," "the persons by whom" they were operated, when the accident happened, were in the "employment" of defendant and acting for it, and hence the question really raised on this appeal must be answered favorably to appellee.

It is claimed that a different conclusion was reached in *Flanigan v. McLean*, 267 Pa. 553, and *Fleccia v. Atkins*, 270 Pa. 573 (in each of which an affidavit of defense was not filed), but the exact reverse is true. In the first of these cases we said: "The failure to file an affidavit of defense in the present case constitutes an admission by defendant that the instrumentality charged with the accident was their truck, doing their business and in charge of their chauffeur, but the burden is still upon plaintiff to prove the accident and other facts necessary to support his case." In *Fleccia v. Atkins*, *supra*, we said: "While the absence of an affidavit of defense relieved plaintiff of the burden of proving that the person alleged to have caused the brick to fall was employed by defendant [and] that the latter was in temporary possession of the building and doing work thereon, the Practice Act cannot be construed to admit the specific act of negligence, to wit, the careless act of permitting the brick to fall." The exceptions thus specified have been met by the proofs in this case,

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and hence, so far as they are relevant, they are authorities against and not for appellant.

In *McGlinchey v. Steigerwald*, 73 Pa. Superior Ct. 520-523, where also no affidavit of defense was filed, the act is correctly, though perhaps too tersely, interpreted as follows: "We think the two sections taken together provide that all facts alleged by plaintiff must be traversed by the defendant except such as show his negligence or prove the damages"; that is, where no affidavit of defense has been filed, plaintiff need not prove whose negligence caused the injury or death of which complaint is made, and defendant will not be permitted to contest that question, but the proofs must show that the injury or death resulted from actual negligence of the character averred in the statement of claim, that plaintiff was damaged by reason thereof, and the extent of his damages.

It should be added, however, in order to avoid misapprehension, that since the Practice Act of 1915 does not deal with the subject of contributory negligence, all matters in relation thereto, both substantive and procedural, remain unaffected by its passage.

The judgment of the court below is affirmed.

Rhodes, Appellant, v. Terheyden et al.

Partnership—Practice, C. P.—Parties—Statement of claim—Promissory notes—Presumption—Act of May 14, 1915, P. L. 483.

1. Where a statement of claim shows that the action is against partners, it is not necessary to expressly aver a joint liability.

2. In an action against partners, it is not necessary to aver that one of them had authority to borrow the money for which suit is brought, since, in the absence of express or implied notice to the contrary, it is presumed each partner is the agent of his copartners, authorized to borrow money for the firm and to give obligations therefor.

3. Where a statement of claim avers that a note was drawn for the benefit of the firm, was endorsed by plaintiff as an accommo-

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dation to the firm, was discounted for the firm, and the proceeds received by the firm, these are sufficient averments, so far as plaintiff is concerned, that the note did not come to the partnership in due course.

4. Under such circumstances, one who makes or endorses a note may recover against the members of the partnership, if he is later compelled to pay the firm debt, even though the names of the partners did not appear on the obligation.

Practice, C. P.—Statement of claim—Insufficient statement—Remedy—Rule for more specific statement—Motion for non pros—Act of May 14, 1915, P. L. 483.

5. If a statement of claim does not conform to the provisions of the Practice Act of May 14, 1915, P. L. 483, the defendant should move to strike it off, as provided by section 21 of the Act.

6. If a statement of claim does conform to the provisions of the Act of 1915, but is not sufficiently specific, the appropriate remedy is a rule for a more specific statement followed by a motion for a non pros, if the court makes the rule absolute and its order is not complied with.

7. The question to be decided under section 20 of the Act of 1915, is not whether a statement is so clear in both form and specification as to entitle plaintiff to proceed to trial without amending it, but whether upon the facts averred it shows, as a question of law, that plaintiff is not entitled to recover.

8. Where a doubt exists as to whether or not summary judgment should be entered, this should be resolved in favor of refusing to enter it.

Argued October 19, 1921. Appeal, No. 205, Oct. T., 1921, by plaintiff, from judgment of C. P. Allegheny Co., April T., 1921, No. 2630, for defendants on affidavit of defense raising question of law, in case of W. B. Rhodes v. Henry Terheyden and J. M. Fickeisen. Before FRAZER, WALLING, SIMPSON, KEPHART and SCHAFER, JJ. Reversed.

Assumpsit on promissory note. Before SWEARINGEN, J.

The opinion of the Supreme Court states the facts.

Judgment for defendant on question of law raised by affidavit of defense. Plaintiff appealed.

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Error assigned, inter alia, was judgment, quoting it.

H. K. Siebeneck, of Seymour, Patterson & Siebeneck, for appellants.—There is an implied agreement by the party accommodated to reimburse an accommodated endorser: *Peale v. Addicks*, 174 Pa. 543; *De Barry v. Withers*, 44 Pa. 356; *Meyran v. Abel*, 189 Pa. 215; *Kern's Est.*, 171 Pa. 55.

The name of the party accommodated need not appear on the paper: *Mosser v. Criswell*, 150 Pa. 409; *Chestnut St. Trust Co. v. Hart*, 217 Pa. 506; *Delaware Trust Co. v. Haser*, 199 Pa. 17; *Dillinger v. Scott*, 19 Hawaii 421.

In accommodation paper the commercial paper rule of liability in inverse order of execution has no application: *Peale v. Addicks*, 174 Pa. 543.

The Negotiable Instruments Act has made no change in the law: *First Nat. Bank v. Dick*, 22 Pa. Superior Ct. 445; *Lackawanna Trust Co. v. Carlucci*, 264 Pa. 226; *Wayne T. & T. Co. v. Treat*, 269 Pa. 303.

John C. Bane, with him *Charles A. Woods*, for appellee, cited: *Graeff v. Hitchman*, 5 Watts 454; *Van Hagen Soap Co.'s Est.*, 141 Pa. 214.

OPINION BY MR. JUSTICE SIMPSON, January 3, 1922:

In his statement of claim, plaintiff avers that defendants and one George I. Whitney, since deceased, had been partners, carrying on business under the firm name of Whitney & Fickeisen, Trustees; that, at Whitney's request, for the accommodation of the firm, he plaintiff, became an endorser of a note for \$5,000 drawn by Whitney to the order of one Stuart H. Robinson, endorsed by the latter, by Fickeisen and by plaintiff, and then delivered to the firm, which had it discounted and applied the proceeds to its own use,—the note being renewed from time to time, with the same endorsements. He further avers that, after Whitney's death, defend-

ants became the surviving partners, with the duty of paying the obligations of the firm, but each had refused to pay to him the amount of the final renewal note, which had been protested, notice thereof given to him, Robinson and defendants, and which he had been obliged to pay, because of the firm's failure so to do.

Terheyden, one of the defendants, filed an affidavit, suggesting that the statement did not show any liability on his part, either individually, jointly or as a member of the partnership; after hearing thereon, final judgment was entered in his favor, and plaintiff appealed.

Three reasons are given by the court below for its conclusion: (1) "It nowhere appears in the statement that defendants had expressly assumed any joint liability." Inasmuch, however, as partners are jointly liable for the debts of the firm (Uniform Partnership Act of March 26, 1915, paragraph III, section 15, P. L. 18, 21), an express averment to this effect was not necessary. (2) "The note was not made by the partnership, and there is no averment that it ever authorized the making thereof." Inasmuch, however, as, in the absence of express or implied notice to the contrary, each partner is the agent of his copartners, authorized to borrow money for the firm, and to give obligations therefor, such an averment was not necessary: *Ihmsen v. Negley*, 25 Pa. 297; *Haldeman v. Bank of Middletown*, 28 Pa. 440; *Moorehead v. Gilmore*, 77 Pa. 118; *Real Estate Investment Co. v. Smith*, 162 Pa. 441. (3) There are no "averments that the note came to the partnership otherwise than in due course." As already pointed out, there are distinct allegations that the note was drawn for the benefit of the firm, was endorsed by plaintiff as an accommodation to it, was discounted for it, and the proceeds received by it. As between plaintiff and the firm, this, of course, makes the latter liable for the indebtedness and entitles him to recover against the individual partners,—of which appellee is alleged to have been one,—as soon as he, plaintiff, was compelled to pay the

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firm debt; and this is so even though their names do not appear on the obligation: *Maffett v. Leuckel*, 93 Pa. 468; *Mosser v. Criswell*, 150 Pa. 409; *Peale v. Addicks*, 174 Pa. 543; *Meyran v. Abel*, 189 Pa. 215; *Lackawanna Trust Co. v. Carlucci*, 264 Pa. 226, 228.

Appellee claims that the statement is fatally defective for the further reason that it does not show he is sued as a member of the partnership. It must be admitted, this fact might have been averred with greater certainty; but the intendment of the statement is clear, appellant seeking to recover from defendants, because and only because they were members of the firm of Whitney & Fickeisen, Trustees, which is alleged to be indebted to him, by reason of his payment of the note under the circumstances already specified.

If appellee was of opinion the averment of the statement did not "conform to the provisions" of the Practice Act of May 14, 1915, P. L. 483, he should have moved to strike it off, as provided by section 21. If he believed it did "conform to the provisions" of the act, but was not sufficiently specific, he should have taken a rule for a more specific statement, and followed this with a motion for a non pros, if the court made his rule absolute and its order was not complied with (*King v. Brillhart*, 271 Pa. 301, 305); this practice still obtains, notwithstanding section 21 of the act, which "is not intended to provide a new or exclusive remedy, applicable to defective pleadings; it is simply a general enabling provision to be read in connection with the rest of the act": *Parry v. First National Bank of Lansford*, 270 Pa. 556, 560.

The question to be decided under section 20 of the act, which provides only "a substitute. . . . for the common law demurrer" (*Hutchinson Baking Co. v. Marvel*, 270 Pa. 378, 381), is not whether the statement is so clear, in both form and specification, as to entitle plaintiff, without amendment, to proceed to trial, but whether, upon the facts averred, it shows, as a "question of law,"

that plaintiff is not entitled to recover. At times it may not be easy to determine under which of the foregoing heads an objection to a particular statement falls (though there is no such difficulty in the instant case), but, in that event, the doubt should be resolved against entering summary judgment, the power so to do being intended only for clear cases: *Kidder Elevator Interlock Co. v. Muckle*, 198 Pa. 388; *Moore v. Luzerne County*, 262 Pa. 216; *Commonwealth Finance Corporation v. Ferrero*, 269 Pa. 264. It is true each of these citations was an appeal from a refusal to enter judgment for want of a sufficient affidavit of defense, but the principle relied on applies with greater force here, in view of the certainty required in such affidavits: *Moore v. Luzerne County*, *supra*. Any other conclusion would be a reversion to the practice,—common in ancient days, but happily not now,—of making the rights of litigants depend on the skill of the pleader, rather than on the justice of their claims.

The judgment of the court below is reversed and a procedendo awarded.

Bungar v. St. Michael's Greek Catholic Church.

Judgment — Opening judgment — Lis pendens — Words and phrases—Church trustees—Judgment for repairs—Equity.

1. *Lis pendens* is the control which a court has over the property involved in a suit during the continuance of the proceedings, and until its final judgment has been rendered therein.

2. The validity of a judgment note given by the trustee of a church to pay a debt contracted for necessary repairs to the church building, does not depend, under the doctrine of *lis pendens*, upon the outcome of an equity suit, where such suit had nothing to do with the church property, but was brought to restrain the trustees from employing any but a priest of a particular denomination, and to prevent the priest in office from holding religious services.

3. A judgment entered on such note will not be opened, although it was given to the president of the board of trustees for

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money advanced by him for repairs, where it appears that in the equity suit a petition was filed which called in question the authority of the trustees to make the repairs, and that the court found against the petitioners, and from such findings no appeal was taken.

Argued October 20, 1921. Appeal, No. 35, Oct. T., 1921, by Alex Kosar et al., from order of C. P. Butler Co., Sept. T., 1920, No. 52, discharging rule to open judgment, in case of John Bungar v. Saint Michael's Greek Catholic Church. Before MOSCHZISKER, C. J., FRAZER, WALLING, SIMPSON, KEPHAET, SADLER and SCHAFFER, JJ. Affirmed.

Rule to open judgment. Before REIBER, P. J.

The opinion of the Supreme Court states the facts.

Rule discharged. Alex Kosar et al., members of St. Michael's Greek Catholic Church, appealed.

Error assigned was order, quoting it.

E. J. McKenna, of McKenna & McKenna, with him James M. Galbreath, for appellant.—The doctrine of *lis pendens* applied in this case: *Com. v. Dieffenbach*, 3 Grant 368; *Dovey's App.*, 97 Pa. 153.

A trustee cannot acquire rights antagonistic to his *cestui que trust*: *Miller v. Ege*, 8 Pa. 352.

Levi M. Wise, with him Murrin & Murrin, for appellee, cited: *Green v. Rick*, 121 Pa. 130.

OPINION BY MR. JUSTICE SCHAFFER, January 3, 1922:

This is an appeal from the refusal of the court below to open a judgment.

John Bungar, plaintiff in the judgment, was president of the board of trustees of St. Michael's Greek Catholic Church; the note on which judgment was confessed, was signed, in the name of the church, by him as president of its board of trustees, and by the secretary and

treasurer thereof. An answer to the petition to open the judgment was filed, and a hearing held, at which no testimony was submitted, so far as this judgment is concerned; all that was produced related to another judgment, which had been confessed by the trustees, and with which we are not concerned.

There has been other litigation involving the affairs of this church, which was disposed of by us, in the case of Chrapko v. Kobasa, 271 Pa. 447. That was a bill in equity filed by certain members of the congregation. Appellants contend this bill in equity was a *lis pendens*, and the judgment note having been made subsequent to the filing of it, with knowledge of the purpose of its filing, the validity of the note was dependent on the outcome of that litigation. "*Lis pendens*, as usually understood, is the control which a court has over the property involved in a suit, during the continuance of the proceedings, and until its final judgment has been rendered therein": Bouvier's Law Dict., Rawle's Revision, vol. 2, p. 2032. "A *lis pendens* is the jurisdiction, power or control which courts acquire over property involved in a suit, pending the continuance of the action, and until its final judgment therein": 17 Ruling Case Law 1008.

On examination of the bill in equity we find its purpose was to restrain the trustees from employing any minister but a Greek Catholic priest, and to prevent the priest, who had been chosen by the trustees, from holding religious services; and, when we go to the opinion by our Brother WALLING, we ascertain that the litigation had nothing to do with the church property. The opinion recites that the bill was filed "against the trustees and Kobasa to secure his ejection and the admission of Hundiak, on the ground that it was a Catholic church," and goes on to say, "A final decree was entered, restraining Kobasa, in effect, from officiating in the church and directing the trustees to admit Hundiak for that purpose, but not taking the church property out of the custody of the trustees." Thus it will be seen, the proceed-

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ing set up as a *lis pendens*, had nothing to do with the property of the church, or the rights and powers of the trustees, in connection with it, and appellants' position that the note is invalid because of a *lis pendens* falls.

In the answer to the petition to open the judgment, it was set up by appellee that the money which it represented, was borrowed from him for the church, and was used in the payment of indebtedness, contracted in making necessary repairs to it, which repairs had been decided upon previous to the institution of the equity proceedings, and were of substantial benefit to the church property; that the money was loaned to the church, in good faith, prior to the issuing of the preliminary injunction in the equity proceeding. There was no evidence submitted in denial of these averments, and, therefore nothing to move the court, sitting as a chancellor, along equitable lines.

Another matter brought to our attention, would seem to be decisive against appellants. In the equity case, a petition was presented for the attachment of the trustees, in which their authority to make repairs to the church was questioned. In that proceeding the court determined that the church building had been in bad repair, and the improvements made were for the substantial benefit of the property. In the light of this conclusion, from which appellants here did not appeal, and in view of the undisputed averment that the money loaned by plaintiff had gone to pay for these repairs, we fail to see how in good conscience and equity his judgment could be disturbed, even though he was president of the board of trustees which gave the judgment note.

The appeal is dismissed at the cost of appellants.

Reilly v. Magee, Appellant.

Equity—Practice—Findings of fact—Appeals.

1. Where there is evidence which sustains a chancellor's findings of fact, the Supreme Court will not reverse except in clear cases.

Vendor and vendee—Deed—Exchange of real estate—Reconveyance if settlement fails—Equity—Cloud on title.

2. Where, pending consummation of an agreement for an exchange of real estate, the deed from one of the parties is executed and recorded, it is the duty of the other to reconvey the property, if the settlement fails; but he is not required to do this until the former presents a deed of reconveyance.

3. An agreement of exchange of properties, operates to vest in each of the respective grantees an equitable title to the property he is to receive, and, hence, if the exchange falls through and the agreement has been recorded, equity has jurisdiction to remove the cloud upon the title thus created.

Practice, Equity—Pleadings—Proofs—Decree—Damages.

4. A decree in equity must conform to the case as made out by the pleadings as well as by the proofs, and hence damages cannot be awarded unless claimed in the pleadings and the fact and extent thereof shown by the evidence.

Argued October 20, 1921. Appeal, No. 206, Oct. T., 1921, by defendant, from decree of C. P. Allegheny Co., Jan. T., 1921, No. 1213, for plaintiff, on bill in equity, in case of John D. Reilly v. Christopher Magee, Jr. Before MOSCHZISKE, C. J., WALLING, SIMPSON, KEFHART, SADLER and SCHAFER, JJ. Affirmed.

Bill in equity for cancellation of agreement for exchange of real estate. Before REID, J.

The opinion of the Supreme Court states the facts.

Decree for plaintiff. Defendant appealed.

Error assigned, inter alia, was decree, quoting it.

John A. Metz, with him *W. C. McClure*, for appellant, cited: *Glenn v. Oil Co.*, 266 Pa. 74.

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E. J. McKenna, of *McKenna & McKenna*, for appellee, cited: *Myersdale, etc., Ry. v. Ry.*, 219 Pa. 558; *Wilson v. Getty*, 57 Pa. 266; *Eckman v. Eckman*, 55 Pa. 269.

OPINION BY MR. JUSTICE SIMPSON, January 3, 1922:

Plaintiff and defendant entered into agreements for the exchange of certain properties "on or before August 1, 1919," stipulating therein that "to accommodate [defendant and his wife] it is desired that a deed from them to [plaintiff] be placed on record at this time" but that so doing "shall in no manner constitute an acceptance thereof by" [plaintiff], whose "only obligations and liability [if the exchange is not effected] shall be to reconvey the legal title to said property" to defendant. The deed to plaintiff was executed and recorded in accordance therewith.

The agreement stated the size and street number of defendant's property, but not its location, and hence it was necessary to have a survey in order to ascertain exactly where the property was, and whether or not there was any conflict between its lines, as specified in the agreements, and those of the adjoining properties. On inquiry being made of defendant's agent, he said defendant had such a survey, but later informed plaintiff otherwise, whereupon the latter ordered one, and to this no objection appears to have been made. The survey was not finished until August 14 or 15, 1919, subsequent to which latter date "plaintiff made at least two efforts to have the defendant or his agent take up the question of closing the transaction, but no time for a meeting of the parties was ever fixed." This finding of the court below is not assigned as error.

On this latter date, August 15, 1919, the holder of the first mortgage on defendant's property, which existed prior to the agreements of exchange and was then being foreclosed,—but of which latter fact plaintiff had no knowledge,—entered judgment on the *scire facias* issued thereon, and by virtue of a writ of *levari facias* the prop-

erty was sold by the sheriff on September 8, 1919. This of course rendered valueless the recorded deed to plaintiff, and freed him from the duty to convey his property to defendant, and indeed from all liability, unless it was his, plaintiff's, neglect which resulted in the sheriff's sale.

Some time later defendant caused the agreements of exchange to be acknowledged and recorded; and as this apparently gave to him an equitable interest in plaintiff's property and operated as a cloud upon the latter's title, he filed a bill in equity to remove it; defendant then filed a cross-bill praying specific performance of the agreements of exchange and an accounting of the rents and profits of plaintiff's property; the two bills were tried together, resulting in a decree in favor of plaintiff, from which the present appeal was taken.

The court below found, *inter alia*, that "time was not of the essence of the contract and the subsequent conduct of both parties shows that the time fixed in the agreement for closing the exchange of properties on August 1, 1919, was waived" (which finding is not assigned as error); that plaintiff, at the time the mortgage was foreclosed, "was proceeding with reasonable diligence to prepare for the closing of the deal"; that "up to August 15, 1919, no notice had been given to [plaintiff] that [defendant] was prepared with the necessary funds to meet the payment of the liens, charges, etc. [the accuracy of this finding being admitted in appellant's paper-book], or that, unless the matter was closed by any particular date, the [agreement of] extension of mortgage [which defendant was to furnish, as a condition of the exchange], would not be available. [Plaintiff] was in fact never given personal notice of such an executed [extension]. He was not notified of the pending entry of judgment on the *scire facias*, and had no reason to know or believe that such judgment would be entered on August 15th, in view of the preparations being made, by the procuring of the survey and

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the examination of the title, to close the transaction under the contract."

At the trial in the court below, the burden of proof of showing it was plaintiff's neglect which resulted in defendant's property being sold by the sheriff, was of course upon the latter; and that burden has become doubly heavy in this court, rendered so by the findings of fact above quoted. It is strongly urged by appellant that there was no countervailing evidence as to some of the facts asserted by him, which would or might affect the above findings; and this may be so, if it is meant there was no direct evidence antagonizing his contention in regard thereto. There was much evidence, however, which, inferentially at least, sustains the court's findings; and, as appellant relies solely upon oral testimony to establish his contentions, the matter was peculiarly within the chancellor's cognizance and is but slightly within ours, even though, judging from the printed page only, we might agree with appellant. We are, therefore, under the well-settled rule upon this subject, obliged to accept the findings as correct, just as we would the verdict of a jury, with evidence to support it (*Scranton v. Scranton Coal Co.*, 256 Pa. 322; *Clothier v. Hoffman Co.*, 261 Pa. 83); and this being so we cannot reverse and enter a decree for specific performance.

It is urged, however, that appellant was entitled, at least, to a decree for damages, and this claim is based largely, if not entirely, upon the contention that it was plaintiff's duty to reconvey defendant's property to him, as soon as he, plaintiff, had determined not to consummate the agreements of exchange, and if this had been done the great loss which defendant suffered would have been avoided, since he had another purchaser for the property. There was, of course, an obligation to reconvey upon the presentation of a deed for the purpose, which, however, it was the duty of the defendant to prepare and present. Touching this contention, the court below finds as facts that "in the latter part of August,

1919, E. C. Barr, agent for [defendant], presented to [plaintiff] a form of deed for execution by [plaintiff] and his wife, which purported to convey [defendant's] property to the said Barr. [Plaintiff] refused to execute said deed unless Barr would produce an assignment of the contract.....or written authority from [defendant] to Barr for the making of the deed to Barr, with whom he had no contract. Such assignment or written authority was never produced. No deed purporting to convey said property to [defendant].....was ever presented or tendered to [plaintiff], or was any request or demand made upon him that he execute or deliver such deed."

The witnesses differ in their recollection as to what occurred when Barr requested plaintiff to execute the deed above referred to, but there is no dispute regarding the other facts thus found; and since, by the agreements of exchange, plaintiff was obligated to "reconvey the legal title" to defendant, he, plaintiff, was well within his rights in requiring, as a condition precedent to his executing the deed to Barr, that defendant give him some paper authorizing the conveyance to be thus made.

Moreover, this contention, and any other which could be made on the question of awarding damages in the instant case, must necessarily fail: (1) Because the cross-bill does not refer to Barr's request for a conveyance to himself, or set forth any facts, on this or any other ground, which would justify an allowance of damages, the facts averred being only consonant with the prayers for specific performance and for an accounting of the rents and profits. This alone precludes an award of damages, since a decree in equity must conform to the case as made out by the pleadings as well as by the proofs: *Luther v. Luther*, 216 Pa. 1; (2) Because, as appellant admits, "no evidence was offered of any money damages sustained by reason of the appellee's breach of contract"; and (3) Because there was no request

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that damages should be allowed, and no assignment of error alleges a refusal to award them.

These conclusions obviate the necessity of considering the assignments of error in detail; if we were to sustain all those which are not concluded by the above findings, we still could not reverse the decree.

The decree of the court below is affirmed and the appeal is dismissed at the cost of appellant.

Orth & Bro. v. Board of Education, Appellant.

Contract—Construction—Architect—Commissions—Gross percentage—Cancellation of contract.

1. It is an unbending rule that all the words of a contract are to be given an appropriate meaning whenever it is reasonably possible so to do.

2. Where an architect's contract provides that he shall be paid for his services a gross percentage upon the entire cost of a building to be erected, such payments to be made in certain percentages as the work progresses, and that the contract may be cancelled, in which event he is to receive, as full compensation, the percentages then due, he will be entitled to recover only the percentages which were payable at the time the cancellation was in fact made.

3. Where an architect's contract provides that he shall receive a gross percentage upon the completion and acceptance of a building, and only a part is completed and accepted, he will be entitled to the full percentage on that part, since there was a completion and acceptance so far as it is concerned.

4. Where an architect's contract provides that a given percentage is to be paid upon the cost of the work and the building is not erected, so that there is no actual cost, the basis upon which the percentage is to be calculated must be determined according to equitable principles, as of the date when the architect's work was actually performed.

5. Where a party has a right to cancel a contract his reasons for so doing are wholly immaterial.

6. Harlow v. Beaver Falls Borough, 188 Pa. 263, and Sauer v. McKees Rocks School District, 243 Pa. 294, cited and explained.

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Statement of Facts—Opinion of the Court. [272 Pa.

Argued October 21, 1921. Appeal, No. 207, Oct. T., 1920, by defendant, from judgment of C. P. Allegheny Co., April T., 1920, No. 826, on verdict for plaintiffs, in case of Geo. S. Orth et al. v. Board of Public Education of the School District of Pittsburgh. Before MOSCH-ZISKER, C. J., WALLING, SIMPSON, KEPHART, SADLER and SCHAFFER, JJ. Reversed.

Assumpsit for architect's services. Before REID, J.

The opinion of the Supreme Court states the facts.

Verdict and judgment for plaintiffs for \$45,000. Defendant appealed.

Errors assigned were various rulings and instructions sufficiently appearing by the opinion of the Supreme Court, quoting record.

J. Rodgers McCreery, for appellant.—The jury was instructed to award the compensation which plaintiff would have earned if he had lived and the building had been completed, less what it would have cost him to complete the contract. In so doing, the court ignored the rule applicable where an entire contract, depending upon personal qualities or ability, terminates by death or disability of the employee. In such case recovery is limited to what has then been earned by the employee. The value of the bargain is not an element.

Ernest C. Irwin, with him *W. K. Johnson, C. Elmer Brown* and *Watson & Freeman*, for appellees.—Under the law and the facts, plaintiff was entitled to recover his full six per cent less the cost of completing his contract: *Harlow v. Beaver Falls*, 188 Pa. 263; *Sauer v. McKees Rocks School Dist.*, 243 Pa. 294.

OPINION BY MR. JUSTICE SIMPSON, January 3, 1922:

Defendant appeals from a judgment in favor of plaintiffs, a firm of architects, who recovered upon a contract

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for preparing plans and specifications and superintending the construction of a high-school building in the City of Pittsburgh; the paragraph relied on being as follows:

"7. The Board shall pay the architect as and in full compensation for his services hereunder, six per cent upon the entire cost of the building; payments to be made as follows:

"1 per centum when the final preliminary study is adopted.

"2 per centum when the working drawings and specifications are completed and adopted.

"1 per centum when the contract is awarded.

"1 per centum in monthly installments, prorated in accordance with the monthly certificate for payment to the contractor or contractors.

"1 per centum upon the completion and acceptance of the building."

If this paragraph was the only one to be considered, it would perhaps be difficult, unless we overruled *Harlow v. Beaver Falls Borough*, 188 Pa. 263, and *Sauer v. McKees Rocks School District*, 243 Pa. 294, to do other than affirm the judgment; since here, as in those cases, the compensation is specified to be a certain percentage "upon the entire cost of the building," the later provisions, relating to the installments, apparently fixing only the times for payment, and not altering the duty to ultimately allow the entire "six per cent." Other paragraphs in the present contract, however, compel a different conclusion from the one reached in those cases.

It further provides that plaintiffs shall prepare "preliminary plans, revisions and changes therein, with such estimates of cost of construction as may be required," shall thereafter "promptly prepare full specifications and such further plans" as may be needed; "shall have supervision of the construction of the building"; that the board reserves the right to terminate the contract if the architect dies, or upon "fifteen days' written notice,"

without the happening of this contingency, in either of which latter events plaintiffs "shall be entitled as full compensation to the percentages then due."

Evidently knowing of the limitations placed by law upon the expenditure of public funds, and that the members of the board would be guilty of a breach of duty if they erected the building at a cost largely in excess of its actual value to the district, plaintiffs inserted in the specifications, which they prepared, the usual provision that the board reserved the right to reject any and all bids. They also, in accordance with the contract, advised the board that the cost of completing the building would be \$643,025, and this, with certain additions afterwards made by consent of the board, indicated a total cost of \$833,530.96.

When the bids were received and opened, it was discovered that,—owing to the greatly increased cost of labor and materials, due to the World War,—the lowest amount for which any one would do the work and the additions above referred to, was the sum of \$1,234,499.89. This was not only greatly in excess of the estimates made by plaintiffs, but, as the court below says, was "far beyond the funds available, or, in any event, a sum which the board did not deem it prudent to expend," and hence, acting in good faith and in accordance with its duty, it rejected all the bids. So far as appears, plaintiffs made no objection to this. The cost of labor and materials having continued to advance, it was decided to abandon the project until matters in the building trades became more nearly normal; and this had not occurred when one of the architects died, and the contract with the firm was rescinded, in accordance with the foregoing provisions of the contract.

The court below held that plaintiffs were entitled to recover six per cent of whatever sum the jury found would have been the cost of the building if it had been constructed at the time the bids were received and rejected, less the sum of \$23,677.94, which had been paid

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on account, and also whatever plaintiffs would have had to expend in superintending the work, (which was estimated to be \$7,000), and that the jury might find the cost of the building would have been the lowest bid above set forth; on this basis the verdict was rendered.

Three questions are raised on the appeal: (1st) Were plaintiffs entitled to six per cent upon the full cost of the building, though it had not been erected? (2d) Was this percentage to be reckoned upon what the cost would have been, had the work been done at the time the bids were received and rejected? (3d) Was it competent to prove that the contract with plaintiffs was cancelled because of their threat to bring suit, if they were not paid? Each of these questions must be determined in favor of appellant.

It is certain plaintiffs must have anticipated the possibility the school would not be erected. This necessarily follows from the provision above referred to, and by the insertion into the specifications of the clause authorizing the board to reject any and all bids. It is certain also that the words, they "shall be entitled as full compensation, to the *percentages then due*," in the clause relating to cancellation of the contract, can mean only the particular percentages, applicable to the situation existing at the time of cancellation. If it was meant, as appellees contend, that the percentages referred to was the single percentage of six per cent, which was provided for superintendence as well as for drawing the plans and specifications, not only was the plural form improper, but the words "percentage then due" were unnecessary and meaningless, for precisely the same result would be reached if they had been omitted. It is an unbending rule, however, that all the words of a contract are to be given an appropriate meaning, whenever it is reasonably possible so to do, as in the present case it is (*Wager v. Wager*, 1 S. & R. 374; *Knickerbocker Trust Co. v. Ryan*, 227 Pa. 245; *Vulcanite Paving Co. v. Phila.*, 239 Pa. 524); and hence the

words "percentages then due" must be given here their usual meaning, and this compels the conclusion that, if the building was not erected, only three per cent was to be paid for the preliminary study and the preparation of working drawings and specifications. There was, however, some work actually done, and for this plaintiffs are entitled to six per cent of its actual cost; we say six per cent, instead of five, because there was a "completion and acceptance of the building," so far as concerns this particular work.

It was also erroneous to estimate the three per cent on the excessive cost, arising out of the unusual conditions prevailing when the bids were received. As already pointed out, one per cent was due when "the final preliminary study is adopted," and an additional two per cent when "the working drawings and specifications are completed and adopted." There was then no other "cost of the building" except the "estimates of cost of construction," calculated by plaintiffs themselves, and hence the three per cent, if then paid, as the contract provided it should be, necessarily would have had to be computed thereon. Appellee's contention that these "estimates of cost, presented to board, were but rough estimates largely based upon data received from defendants' superintendent of buildings," is of no moment. They were none the less plaintiff's estimates, prepared for the purpose of enabling the board to determine whether or not it would ask for bids, and must be held binding, therefore, in case of a decision, in good faith, not to proceed. The same conclusion, however, is reached from another standpoint.

The contract calls for the six per cent to be estimated on the "entire cost of the building," of which, strictly speaking, there was none, since the building was not constructed. Hence it is necessary to determine, according to equitable principles, what the parties contemplated should be paid in the event of this contingency. Appellee contends that the words "percentages

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then due" necessarily refer to the time of cancellation, and this is, of course, true; but they do not refer to the "cost" on which those percentages are to be calculated. Clearly they were to be compensation for the work actually done, not for that which might be done, and equally clearly they were to be measured by the value of the work at the time it was done, not at some later time, when the basis might be either more or less, and certainly not when an unexpected contingency greatly changed the status. In the present instance, this period of time was before the great increase in the cost of labor and materials, and not afterwards. This conclusion does not militate against the fact that, if the work had been done, the actual cost would have been the basis; for then there would have been an "entire cost of the building," and the different parts of the contract, "preliminary study," the preparation of "the working drawings and specifications," the additional drawings which, appellee testified, always have to be made during the progress of the work, and the supervision of the work itself, would have furnished, together and not separately, the six per cent payable on that "entire cost."

Perhaps every one would admit, that if, by reason of the draft, it had been almost impossible to obtain labor and materials for building purposes, so that the lowest bid had been \$10,000,000 or \$20,000,000 instead of \$1,234,499.89, these percentages could not have been charged on the larger figure; yet the difference is one of degree only and not in kind, and, under the ruling of the court below, the cost, determined even by such an excessive bid, if fairly made, might have furnished the proper basis.

It follows that, so far as the present record discloses, the jury should have been told that the three per cent was to be calculated on the \$643,025 "estimate of cost of construction" prepared by plaintiffs and accepted by defendant, plus the additions of \$190,515.96 made by consent of the board.

The error, which underlies the court's conclusion on this point, consists in supposing that the method, which is usually adopted in applying the appropriate legal rule to the facts of a particular case, is the rule itself. This mistake is not an uncommon one, for a statement of the means nearly always adopted to reach a particular end, if repeated often enough, will cause many to unthinkingly conclude it is the only method to attain the end, and hence is, in effect, the end itself. A striking instance of this is found in the cognate case of *Kountz v. Kirkpatrick*, 72 Pa. 376, where the court below was reversed for holding that the measure of damages for the failure to deliver stock, was the difference between the market price and the contract price, at the time and place of delivery; whereas the true measure is the difference between the value of the article and the contract price, at that time and place; the "value" being nearly always determined by the "market price," but not permissible there because of the unusual circumstances appearing in the evidence.

We are also of opinion that evidence of the alleged threat made by plaintiff's counsel to defendant's, when they were negotiating for a settlement of the controversy, should not have been admitted; it could not aid the jury in determining any of the questions to be decided by them. If for no other reason, it was inadmissible because defendant had the right to cancel the contract, and hence its reasons for so doing were wholly immaterial: *Scott v. Pittsburgh*, 266 Pa. 52; *Roush v. Herbick*, 269 Pa. 145.

The judgment of the court below is reversed and a *venire facias de novo* is awarded.

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Syllabus—Verdict.

Leslie v. Catanzaro, Appellant.

Negligence—Automobiles—Collision between car and sled—Res ipsa loquitur—Sudden emergency—Obstruction of view—Notice of sledding.

1. The mere fact that an automobile comes in contact with a sled coasting across a road, raises no presumption of lack of care on the part of the driver of the automobile.

2. One who, in sudden emergency, acts according to his best judgment, or who, because of want of time in which to form that judgment, omits to act in the most judicious manner, is not chargeable with negligence.

3. Where an automobile collides with a sled coasting across the road, and the evidence shows that the driver of the automobile had no actual or constructive notice of sledding at the place of the accident, and that, under the circumstances and in the sudden emergency, he did what a reasonably prudent man would do in endeavoring to move his car from the path of the oncoming sled, he cannot be charged with negligence, and a case against him should not be submitted to the jury.

4. In such case the evidence must be of a convincing character to justify a jury in finding that the driver must have been aware of coasting at the place of the accident, and therefore had imposed upon him the duty of taking unusual care.

Argued October 24, 1921. Appeal, No. 97, Oct. T., 1921, by defendant, from judgment of C. P. Allegheny Co., Jan. T., 1917, No. 2059, on verdict for plaintiff, in case of Effie Leslie, a minor, by her father and next friend, Levi Leslie, and Levi Leslie in his own right, v. Samuel Catanzaro. Before MOSCHZISKER, C. J., FRAZER, SIMPSON, KEPHART, SADLER and SCHAFFER, JJ. Reversed.

Trespass for personal injuries. Before SHAFFER, P. J. The opinion of the Supreme Court states the facts.

Verdict and judgment for plaintiff, Effie Leslie, for \$3,500 and for defendant as to Levi Leslie: see 68 Pitts. L. J. 28; 11 Municipal L. R. 179. Defendant appealed.

Assignment of Error—Opinion of the Court. [272 Pa.

Error assigned, inter alia, was refusal of judgment for defendant n. o. v., quoting record.

John J. Kennedy, of *Griffith & Kennedy*, with him *J. Roy Dickie*, for appellant.—Defendant was not chargeable with negligence: *Eastburn v. U. S. Express Co.*, 225 Pa. 33; *Hyatt v. Johnston*, 91 Pa. 196; *Phillips v. Ry. Co.*, 190 Pa. 222.

Ralph P. Tannehill, with him *Rody P. & Meredith R. Marshall*, for appellee.—That it may be negligence to drive upon the left or wrong side of a street was decided in the case of *Yeager v. Gately*, 262 Pa. 466; see also *Walleigh v. Bean*, 248 Pa. 339.

It is not negligence per se to coast on a street which is not put to much public use, when not expressly prohibited by ordinance: *Feldman v. Riccordino*, 58 Pa. Superior Ct. 114.

OPINION BY MR. JUSTICE SADLER, January 3, 1922:

Plaintiff brought an action to recover damages for injuries sustained in a collision between the sled on which she was coasting and the automobile of defendant. Her statement of claim averred negligence in the running of the car without lights, and at an excessive speed, and charged, as well, careless operation of the motor. As to the first two complaints, no evidence was offered, and, if the verdict of the jury in favor of the plaintiff is to be upheld, it must be justified by the testimony submitted, and the inferences to be drawn therefrom, that the defendant failed to use due care in guiding his automobile.

Heberton Avenue, in the City of Pittsburgh, approaches Stanton Avenue from the north at rightangles and at a steep grade. From the latter, Meadow Street departs not in a direct line with Heberton, but from the southern side diagonally to the southeast. A clear view across Stanton and down Meadow Street, or from this

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roadway up Heberton, is impossible. Vision was specially interfered with at the time of the accident because of the occupation of practically one-half of Meadow Street, at a point about fifteen feet distant from Stanton, by a pile of building materials and a contractor's shanty, leaving not more than a 15-foot clearance for one approaching from the east.

Before coming to the Heberton Avenue hill on the night in question, Miss Leslie, with her companions, had been coasting upon a road to the west. When the accident occurred, two men were stretched out on the sled; she was kneeling on the rear, reaching over them, and holding the sides with her hands. They descended the grade at a rapid rate, crossed Stanton, and entered Meadow Street. At the same time, the defendant ascended the latter highway, on the right-hand side, until he reached the obstacle near the corner. The car which he was driving was equipped with lights; there were chains on the rear wheels and the brakes were in proper condition, as is shown by the stopping of the automobile practically within its own length. As he came toward Stanton Avenue his horn was blown. When he rounded the obstruction there was the first opportunity to observe the rapidly approaching sled which, at the moment, was distant from 15 to 25 feet, and, in the emergency, he turned his car to the left. It had almost reached the west curb when the coasting party came in contact with the front right-hand mud guard, resulting in injury to the plaintiff. The machine mounted the sidewalk to the driver's left, and, when it ceased motion, the front was about four feet beyond the curb.

The only proof of negligence, on the part of defendant, rests upon an inference drawn from the location of the car at the moment of collision. In considering this, it is to be kept in mind that the position of the automobile was made necessary by the condition of the highway, the width of which for traveling purposes was reduced at the point in question by half, and the sudden

turn, then made, to the west curb, was clearly for the purpose of avoiding the accident. The sled could not have been seen until the automobile was moved, around the obstruction, from the right-hand side of the street, on which defendant was properly traveling. The distance between the coasting party and defendant's car was then not in excess of 25 feet, and the time elapsing until the impact, basing the calculation on the undisputed rate at which the motor car was moving, could not have been greater than one or two seconds. The rapidly moving sled was from two to four feet from the west curb line, leaving clear not more than 10 or 12 feet in which the motor, coming around the pile of building material, could be straightened out, and headed again toward Stanton Avenue.

There was no clear evidence defendant was aware that coasters might be met upon the highway. It is true the defendant lived within a few blocks of the scene of the occurrence, and the plaintiff, and one of her companions, testified to the fact that sometime earlier in the evening sleds had passed along the street; and it is likewise a fact that a third witness said one had passed down Heberton Avenue a short time before, and this thoroughfare was always so traveled when there was snow upon the ground. Any knowledge of such a usage was denied by defendant, and we are not satisfied that the evidence was so convincing as to justify a jury in saying that the driver on the highway must have been aware of this situation, and therefore had imposed on him the duty of taking unusual care, in view of the possibility of meeting those who might be coasting: Cf. *Fitzpatrick v. Penfield*, 267 Pa. 564; *Lockney v. Police Beneficiary Assn.*, 217 Pa. 568. The facts relied upon to establish this constructive notice are certainly not so strong as appeared in *Eastburn v. United States Express Co.*, 225 Pa. 33, a decision frequently cited, and approved subsequently in *Wetherill v. Showell, Fryer & Co.*, 264 Pa. 449, distinguishing *Yeager v. Gately & Fitzgerald*, 262

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Pa. 466, in which latter case, knowledge by defendant of the use to which the street was being put plainly appeared. As was said in the opinion of the present Chief Justice, sitting in the court below, in the first of the authorities referred to: "This was not a case of one in plain sight and about to cross the street in front of an [automobile], with opportunity on the part of the driver to see the person and avoid an accident, but was a case of a sled moving rapidly, beyond sufficient control of the boys to avoid a collision with one who had no reasonable expectation to look for such an event."

Whether defendant is charged with notice of the fact that sledding took place on Meadow Street or not, we are still of the opinion that the evidence here produced showed no negligence on his part, which would justify the assessment of damages against him for the injury which unfortunately resulted. Certainly, the mere fact that the automobile came in contact with plaintiff raises no presumption of the lack of due care: *Flanigan v. McLean*, 267 Pa. 553. "Where the sole basis of liability is the omission to perform a certain duty suddenly and unexpectedly arising, there must be not only a consciousness of the facts which raise the duty on the part of the person who is charged with its performance, but also a reasonable opportunity to perform it": *Phillips v. People's Pass. Ry. Co.*, 190 Pa. 222; *McKee v. Traction Co.*, 211 Pa. 47. One who, in sudden emergency, acts according to his best judgment, or who, because of want of time in which to form that judgment, omits to act in the most judicious manner, is not chargeable with negligence, and there is no liability for an injury inflicted by one upon another even though the injured person be free from fault, if the cause producing it was unusual, and one which reasonable and careful human foresight could not have foreseen and guarded against. If the defendant was not guilty of want of ordinary care, it must be considered an inevitable accident: *Donahue*

v. Kelly, 181 Pa. 93; Wingert v. P. & R. Ry. Co., 262 Pa. 21.

It was undoubtedly the duty of defendant to keep his car under control, so as to be able to stop within a reasonable time in an emergency (McMillen v. Strathmann, 264 Pa. 13); the evidence in this case shows careful management of the machine by defendant. Under the circumstances, he did what a reasonably prudent man would do in endeavoring to move his car from the path of the oncoming sled, and the facts, examined from the standpoint most favorable to plaintiff, and giving to her the benefit of all fair inferences which may be drawn therefrom, lead to the conclusion that no negligence was shown, and binding instructions for defendant should have been given: Eastburn v. United States Express Co., supra; Kiley v. Boston Elevated Ry. Co., 207 Mass. 542, 93 N. E. 632; Hoff v. Ward Baking Co., 70 Pa. Superior Ct. 235.

The motion for judgment non obstante veredicto should, therefore, have been granted, and the second assignment of error, based on the refusal, is sustained. Specific reference to the other matters suggested becomes unnecessary.

The judgment is reversed, and is here entered for defendant.

Coyne, Appellant, v. Prichard et al.

Building laws—Municipalities—Cities of second class—Officers—Ministerial duties—Permits—Garage—Board of city planning—Acts of June 7, 1895, P. L. 135; March 7, 1901, P. L. 20; June 10, 1911, P. L. 872; May 13, 1915, P. L. 297, and June 21, 1919, P. L. 570—Mandamus—Nuisance.

1. The authorities of a city of the second class have no right to refuse a permit for the construction of a garage because of the disapproval of the location by the board of city planning, where it appears that such board had not as yet made its final report as to the

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areas in which various trades and business could be carried on, and no hearing thereon was had before the city council as required by the Act of June 21, 1919, P. L. 570.

2. Where an ordinance provides that an official named shall issue a building permit, when the applicant therefor shall have complied with all the requirements of the laws and ordinances, the duty of the official is merely ministerial, and if he refuses to issue the permit, mandamus is the proper remedy to compel him to do so.

3. The fact that the proposed garage is to be built in a residential neighborhood, and that its occupation and use will constitute a nuisance, is no ground for refusing a permit.

4. The question as to the legality of the alleged intended use must await determination in proper proceedings after such use is attempted to be made of the building.

5. The fact that the permit may be useless to the applicant, is no reason for refusing to issue it.

Argued October 25, 1921. Appeal, No. 211, Oct. T., 1921, by plaintiff, from judgment of C. P. Allegheny Co., Jan. T., 1921, No. 962, for defendant, on trial without a jury, in case of James J. Coyne v. Charles B. Prichard, Director of the Department of Public Safety of the City of Pittsburgh and S. A. Dies, Superintendent of the Bureau of Building Inspection of the Department of Public Safety of the City of Pittsburgh. Before MOSCHZISKER, C. J., FRAZER, SIMPSON, KEPHART, SADLER and SCHAFFER, JJ. Reversed.

Petition for mandamus.

Trial by agreement without a jury. Before CARPENTER, J.

The opinion of the Supreme Court states the facts.

Judgment for defendant: see 69 Pitts. L. J. 465. Plaintiff appealed.

Error assigned, inter alia, was judgment, quoting it.

Howard Zacharias, with him Howard Neely, for appellant.—When the plans and specifications are in full

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compliance with the laws and ordinances of the city, the superintendent must issue the permit: *Com. ex rel. v. Heckert*, 7 Pa. Dist. R. 186; *Schoch v. Morris*, 46 Pa. C. C. R. 119.

Thomas M. Benner, Assistant City Solicitor, with him *Charles B. Prichard*, City Solicitor, for appellee.—The permit was properly refused: *Childs v. Napheys*, 112 Pa. 504; *Alexander v. Porter*, 42 Pa. C. C. R. 210; *Com. ex rel. v. Hill*, 14 Pa. Dist. R. 345.

OPINION BY MR. JUSTICE SADLER, January 3, 1922:

The appellant desired to construct a building for garage purposes in the City of Pittsburgh. Plans were prepared and submitted to the proper authorities with a request that a permit be granted. This was refused, but not because of the insufficiency of the application, or any failure to comply with the requirements of the ordinance regulating buildings. The reason, as appears by the pleadings, was the disapproval of the location by the board of city planning. Did the opposition of this body justify the action of those charged with the issuance of such permits?

The bureau of building inspection was created by the Act of 1895 (June 7, P. L. 135), and the Act of 1915 (May 13, P. L. 297), and its powers are defined thereby. By the earlier legislation, provision had been made for appropriate proceedings in case of the refusal of a permit, and a method furnished by which the property owner could secure redress in case his interests were improperly affected by any decision. The subsequent act, however, repealed these provisions, without substituting any other remedy. In 1916, an ordinance was passed, by virtue of authority granted the previous year, regulating the construction of buildings, which declares, *inter alia*: "When such application, plans and specifications or descriptions indicate full and complete compliance with the requirements of the laws and ordinances, the superin-

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tendent shall issue or cause to be issued a certificate for a permit." It is evident that the obligation to grant the leave to build is absolute, where the prerequisite conditions have been fulfilled. The duty of the officials placed in charge thereafter is merely ministerial. If this be so, then mandamus is a proper remedy to be pursued when the formal consent is improperly refused: *Panther Valley Water Co. v. Blaney*, 66 Pa. Superior Ct. 253; *Cheltenham Trust Co. v. Blankenburg*, 241 Pa. 394; *Com. ex rel. v. Underwood*, 269 Pa. 36; *Com. ex rel. v. Pittsburgh*, 204 Pa. 219; *Douglas v. McLean*, 25 Pa. Superior Ct. 9; *Chester v. Paxson*, 76 Pa. Superior Ct. 40.

It is to be noted that here the sole reason for the denial rested on the protest of the city planning commission against the proposed structure at the point designated. Under the ordinance of 1916, no such excuse, based on location, could be validly interposed. If the objection of the commission is to control, its power to interfere must be found in the laws creating that body. By the Act of March 7, 1901 (P. L. 20), and supplements of June 10, 1911 (P. L. 872), and June 21, 1919 (P. L. 570), an additional executive department for cities of the second class was provided, to be known as the department of city planning, and to be in charge of a city planning commission. This board has the power to regulate and restrict the areas in which trades and business of various kinds can be carried on. The appointees in Pittsburgh have undertaken the work of districting the city, but as yet no recommendations have been made to the council. In view of the express provision of the Act of 1919, that "cities shall not determine the boundaries of any district, nor impose any regulations or restrictions until after the final report of the city planning commission, and after hearing before council," any action by the board limiting the areas in which certain structures shall be built, is without effect, and this is conceded by the learned court below.

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The court was, however, of opinion that the bureau of building inspection was justified in heeding the commission's protest, since it appeared that the building was to be erected within a limit which that body intended to define as residential, and that the construction and operation of the garage would be of detriment to adjoining property. Testimony was taken to show the character of the neighborhood, and the effect of building a structure of the kind proposed, and it was found as a fact that "the occupation and use thereof as a public garage will constitute a nuisance." On this ground the proceeding was dismissed.

The rule which should control has been thus stated: "If the right of the applicant to erect the building for which the permit is sought is otherwise absolute, it is no ground for the denial of the permit, or of a mandate to compel the issuance, that the applicant intends to put the buildings, when erected, to an improper use; the question as to the legality of the alleged intended use must await determination in proper proceedings after such use is attempted to be made of the building": 18 R. C. L. 215; *Bostock v. Sams*, 95 Md. 400, 52 Atl. 665. It may be that those in interest can make out a case which will result in equitable relief, and prevent the doing of the act complained of, but even if an injunction was granted, it would be directed to the use of the building and not to the structure itself: *Penniman v. Hoffman*, 262 Pa. 100; *Rhodes v. Dunbar*, 57 Pa. 274; *Barclay v. Com.*, 25 Pa. 503. The sole question here is the right to the permit. If it was wrongfully refused, the writ should be granted; for the mere fact that it may be useless to the relator, is no reason for refusing to issue it: *Truitt v. Phila.*, 221 Pa. 331. We see in this case no reason given which legally justifies the action of the department of building inspection.

The judgment of the court below is therefore reversed, and it is ordered that judgment be entered for the plaintiff with costs, and it is directed that a peremptory mandamus issue as provided by law.

Sullivan v. Baltimore & Ohio R. R., Appellant.

Negligence—Railroads—Interstate commerce—Federal Employers' Liability Act of April 22, 1908, 35 Stat. 65, ch. 149—Evidence—Brakeman—Defective appliance—Case for jury—Happening of accident—Res ipsa loquitur.

1. In an action for personal injuries under the Federal Employers' Liability Act, plaintiff must show not only that the carrier was engaged in interstate commerce, but also that he himself was so engaged at the time of the injury.

2. Where the evidence is clear enough to justify a declaration as to the class of work in which plaintiff was engaged, the court may so declare; but, where the question rests upon facts as to which there may be doubt, the solution is for the jury.

3. The fact that intrastate as well as interstate cars were included in the train upon which plaintiff was injured, does not alter the character of the service.

4. If plaintiff brings his suit under the Federal Employers' Liability Act, instead of the Safety Appliance Act, he is bound to present a case free from facts showing the risk was one which had been assumed by him when employment was accepted.

5. A railroad company is bound to exercise due care to ascertain whether its appliances remain in a reasonably safe condition, and to remedy any defects which may be discovered.

6. In an action by a brakeman against his employer for injuries sustained by the breaking of a defective ladder on a car, the case is for the jury where the only witness as to the defective condition of the ladder was plaintiff himself, and the witnesses for defendant testify that no such defect appeared upon inspection.

7. The mere fact of the happening of the accident gave rise to no presumption of negligence.

Negligence—Injuries—Evidence—Expert testimony.

8. In an accident case, testimony by a physician that a permanent injury complained of could have occurred from the accident, is insufficient, if the finding of the jury is to rest alone on expert testimony. To be effective, such witness must necessarily state at least that the present condition probably resulted from the injury.

9. Where one of two or more possible causes may have resulted in an injury, the burden is on plaintiff to show that the one for which defendant was responsible was the proximate cause, and

that the harm done followed as the natural and probable result, without the intervention of some intermediate agency not attributable to defendant's wrongful act.

Appeals—Question not presented in court below—Statement of questions involved.

10. Where a question is not raised in the court below, it will not be considered on appeal.

11. If a question is not included, or plainly suggested, in the statement of questions involved, it will not be considered by the appellate court.

Appeals—Excessive verdict—New trial—Discretion of court—Abuse.

12. The exercise of the power to set aside a perverse verdict, when injustice is apparent, is ordinarily for the court below. It is only where there is an abuse of discretion that a verdict will be set aside by the appellate court.

Argued October 25, 1921. Appeal, No. 105, Oct. T., 1921, by defendant, from judgment of C. P. Allegheny Co., Jan. T., 1917, No. 188, on verdict for plaintiff, in case of Ralph Sullivan v. Baltimore & Ohio Railroad Co. Before MOSCHZISKER, C. J., FRAZER, SIMPSON, KEPHAET, SADLER and SCHAFER, JJ. Affirmed.

Trespass for personal injuries. Before CARNAHAN, J. The opinion of the Supreme Court states the facts.

Verdict for plaintiff for \$18,000, on which judgment was entered for \$12,000. Defendant appealed.

Errors assigned, among others, were (2) refusal of judgment for defendant n. o. v.; (3) entry of judgment for \$12,000 and (6) refusal of new trial, quoting record.

J. M. Wright, of *Wright, Chalfant & McCandless*, for appellant.—To entitle plaintiff to recover under the Employers' Liability Act, there must be proof of negligence: *Reese v. R. R.*, 239 U. S. 463; *Bruggeman v. York*, 254 Pa. 430; *Alexander v. Water Co.*, 201 Pa. 252.

The verdict even as reduced by the court is so excessive as to entitle defendant to a new trial.

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The work in which Sullivan was engaged at the time of the alleged accident was a local switching operation, and was not interstate commerce: *Shanks v. R. R.*, 239 U. S. 556; *Di Donato v. Ry.*, 266 Pa. 412.

Both the employee and the employer must be engaged in interstate commerce "at the time of the injury": *Shanks v. R. R.*, 239 U. S. 556; *Chicago, B. & Q. R. R. v. Harrington*, 241 U. S. 177.

R. P. Marshall, with him *M. R. Marshall* and *Oliver K. Eaton*, for appellee.—That plaintiff owed a duty of inspection to the plaintiff is settled: *McGinley v. R. R.*, 235 Pa. 576; *Irwin v. R. R.*, 226 Pa. 156; *McConnell v. R. R.*, 223 Pa. 442; *Marsh v. R. R.*, 206 Pa. 558.

The judgment was not excessive.

The court did not abuse its discretion in allowing the verdict of \$12,000 to be reduced to judgment: *O'Hanlon v. Rys.*, 256 Pa. 394.

The parties were engaged in interstate commerce at the time of the accident: *Shanks v. R. R.*, 239 U. S. 556; *North Carolina R. R. v. Zachary*, 232 U. S. 248; *Louisville & N. R. R. v. Parker*, 242 U. S. 13; *New York Central, etc., R. R. v. Carr*, 238 U. S. 260; *Penna. Co. v. Donat*, 239 U. S. 50; *Great Northern Ry. Co. v. Otos*, 239 U. S. 349; *Erie R. R. v. Winfield*, 244 U. S. 170; *Whalley v. R. R.*, 248 Pa. 298; *Murray v. R. R.*, 263 Pa. 398; *Seaboard, etc., R. R. v. Koennecke*, 239 U. S. 352; *Pedersen v. R. R.*, 229 U. S. 146; *St. Louis, S. F. & T. R. R. v. Seale*, 229 U. S. 156; *N. Y. Cent. R. R. v. Porter*, 249 U. S. 168.

OPINION BY MR. JUSTICE SADLER, January 3, 1922:

The plaintiff was employed by defendant company as a brakeman in its railroad yards on the night of November 23, 1915, and claimed to have then suffered an injury. As was his duty, he stood on the top of a freight car for the purpose of signaling the engineer. Having performed this service, he attempted to descend to the

ground by means of a ladder provided for that purpose. It appeared by his testimony that one of the rungs broke or pulled from its socket, causing him to be thrown and hurt. Sullivan claimed he was employed in interstate commerce, and an action was brought to recover under the Federal Employers' Liability Act (Act April 22, 1908, 35 Stat. 65, ch. 149). The first trial resulted in a finding, which was set aside; the second hearing terminated in a verdict for \$18,000, reduced as excessive, upon motion, to \$12,000. From the judgment entered this appeal has been taken.

At the outset, it becomes necessary to determine the character of the service of the plaintiff. To make applicable the federal statute, it must appear not only that the carrier was employed in interstate commerce, but that the one injured was likewise so engaged at the time: *Shanks v. D., L. & W. R. R.*, 239 U. S. 556. This was properly explained to the jury in the present instance, and, under the circumstances developed, the question was one for its consideration: *North Carolina R. R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591. There may be cases in which the evidence is so clear as to justify a declaration by the court as to the class of work in which a claimant is engaged (*Moyer v. P. R. R.*, 247 Pa. 210; *Hench v. Penna. R. R. Co.*, 246 Pa. 1), but, where the question rests upon facts as to which there may be doubt, the solution is for the jury. Here, there was testimony from which it could be found that the plaintiff was employed in making up a train, on the tracks of defendant company, for delivery to a connecting railroad for through shipment. Both were at the time engaged in interstate business, and the particular train contained certain vehicles billed to points in other states. The fact that intrastate as well as interstate cars were included does not alter the character of the service: *P. & R. Ry. Co. v. Polk*, 255 U. S. 518. "The true test of employment in such commerce in the sense intended is, was the employee at the time of the injury

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engaged in interstate transportation or in work so closely related to it as to be practically a part of it?" *Shanks v. Railroad*, supra. See also, *Erie Railroad v. Winfield*, 244 U. S. 170; *Penna. Railroad v. Donat*, 239 U. S. 50; *Louisville & N. Railroad v. Parker*, 242 U. S. 13. The jury, under proper instructions, found Sullivan was so occupied, and the conclusion reached was justified by the evidence adduced.

The Federal Employers' Liability Act therefore controls the rights of the claimant; the trial was had on this theory. The plaintiff might have instituted his action, basing his contention upon the Safety Appliance Act of March 2, 1893 (27 Stat. at Large, ch. 196), as amended by the Act of April 14, 1910 (36 Stat. at Large, ch. 160), and recovered without proof of negligence, if he showed that proper ladders were not provided on the cars about which he was employed: *Texas & Pacific Ry. Co. v. Rigsby*, 241 U. S. 33; 1 *Roberts Federal Liability of Carriers* 921; 2 *Id.* 1368. But his demand was based on the former statute; as a result, it was incumbent upon him to prove lack of due care by the defendant, which was the proximate cause of the injury, and to present a case free from facts showing the risk was one which had been assumed by him when employment was accepted: *Southern Pacific Company v. Berkshire*, 254 U. S. 415.

To meet the burden, plaintiff described a fall from a ladder attached to the car,—an appliance provided by the railroad for use by the employees under circumstances here presented. He testified to the displacement of a rung, causing his sudden descent, and that an examination showed the ladder to be rusted and so worn throughout that it was "practically ready to fall away." This condition was observable to any one who examined it. It is true this evidence comes from the appellant alone, but it was for the jury. The contradiction of the statements, made by witnesses for defendant, which tended to show that no such defect appeared upon in-

spection made the same day, was for the consideration of that body, and the court below would not have been justified in treating the matter as one of law: *Hartman v. Western Maryland Ry.*, 246 Pa. 460; *Forrest v. Phila. Transit Co.*, 261 Pa. 383.

The mere fact of the happening of the accident gave rise to no presumption of negligence. Something more must appear to justify such finding: *Weaver v. Wohlsen*, 254 Pa. 375. The evidence shows, if believed, that the ladder was rusty and perceptibly fragile. Was the external appearance sufficient to indicate the danger, and that the railroad company had not performed its duty in making inspection of its cars? Unless the employer had previous knowledge of the defect, or ought to have had such, he is not to be held responsible for injury resulting from some unforeseen event: *Mensch v. P. R. R. Co.*, 150 Pa. 598; *Desibia v. Ry.*, 262 Pa. 227. But if a proper examination would have disclosed the peril (*Palkovitz v. Am. Sheet & Tin Plate Co.*, 266 Pa. 176; *Allison v. Fitz Water Wheel Co.*, 250 Pa. 111; *Hultgren v. Erie Water Works*, 249 Pa. 437), the contrary is true. A railroad company is bound to exercise due care to ascertain if its appliances remain in a reasonably safe condition, and to remedy any defects which may be discovered. The observable condition of the object may be sufficient to put it on guard: *Case v. Lehigh Coal Co.*, 248 Pa. 598; *McGinley v. C. R. R. of N. J.*, 235 Pa. 576. Here, if the ladder was in fact in the physical state described, the jury could find that a cursory examination would have called attention to the risk (*Phila. & R. R. R. Co. v. Huber*, 128 Pa. 63; *McConnell v. P. R. R. Co.*, 223 Pa. 442; *Rinehuls v. Ely*, 247 Pa. 1); whereupon, the duty was imposed to make proper tests to discover the extent of the impairment, and to take such steps as might be required to prevent harm: *Shoemaker v. Lehigh Valley R. R. Co.*, 236 Pa. 120; *McConnell v. Moosic Mountain Coal Co.*, 74 Pa. Superior Ct. 105. The question involved was carefully

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and correctly submitted to the jury, and the evidence justified the finding which it reached.

It is further insisted that no recovery can be had, since the proofs failed to clearly show that the injury, for which damages were sought, was the result of the negligent act. In March of 1915, Sullivan was operated upon for appendicitis, and testimony for defendant disclosed subsequent treatment by the doctors for a swollen leg. The plaintiff denied the existence of this condition, and offered proof of his good health at the time of the accident. The external hurt to his back and leg was described, the attention he received from the physicians of defendant, and, later, from others. His doctor testified the permanent injury complained of could have occurred from the fall. This in itself would be insufficient, if the finding of the jury was to rest alone on expert testimony. To be effective, such a witness must necessarily state at least that the present condition probably resulted from the injury, as was held in *Fink v. Sheldon Axle & Spring Co.*, 270 Pa. 476, a case in which no evidence of any surface injury appeared, and the claimant relied solely on medical opinion. In the present instance, there were facts presented which, if accepted as true, would fairly justify the inference that the cause was as claimed by plaintiff.

It is undoubtedly the law that where one of two or more possible causes may have resulted in an injury, the burden is on the plaintiff to show that the one for which the defendant was responsible was the proximate cause, and that the harm done followed as the natural and probable result, without the intervention of some intermediate agency not attributable to the defendant's wrongful act: *Miller v. Director General*, 270 Pa. 330; *Kemmler v. Penna. Co.*, 265 Pa. 212. Where, as here, there was evidence which would justify a conclusion that the injury, at least in part, was the result of the tort, the question is for the jury: *Guckavan v. Traction Co.*, 203 Pa. 521; *McCafferty v. P. R. R. Co.*, 193 Pa.

339; *Brashear v. Phila. Tr. Co.*, 180 Pa. 392; *Herstine v. Lehigh Valley R. R. Co.*, 151 Pa. 244. Even if the proof was not sufficient as to the lasting damage to the leg,—as to this the jury was carefully instructed,—the plaintiff was entitled to recover for the temporary injuries, if the railroad had harmed him through its negligence. It is to be noted the evidence of Dr. Ralston, as to the cause of plaintiff's present condition, was not objected to as insufficient, nor was there any request to strike it out; no additional instructions were asked of the court; no point was presented as to the absence of proper proof to show a fixed future loss, nor was a new trial asked because of the submission of this question to the jury. The theory now urged was not presented to the court below, and it is too late to advance it here: *Hurt v. Fuller Canneries Co.*, 263 Pa. 238. Even if merit appeared in the complaint raised at this time, it is not included, or plainly suggested, in the statement of questions involved, which is necessary, if a review is desired: *Furman v. Broschious*, 268 Pa. 119.

Again, we are asked to set aside the verdict as excessive, and award a new trial. It is insisted that the finding of the jury rests almost exclusively on the testimony of plaintiff, and that the contradictions are so many and so strong as to render any conclusion based thereon erroneous. A careful examination of the record does not convince us that the facts justify interference by this court, under the well-established rules which have been laid down as controlling in such cases. Where the result depends upon ascertainment of facts and inferences therefrom, the question is necessarily for the jury. The exercise of the power to set aside perverse verdicts, when injustice is apparent, is ordinarily for the court below: *Maloy v. Rosenbaum Co.*, 260 Pa. 466. It is only where there is an abuse of discretion that a finding will be disturbed on appeal, on the grounds suggested: *Willenpart v. Otis Elevator Co.*, 269 Pa. 131. Here, two trials were had, and in both instances the

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judge presiding found the evidence sufficient upon which to base a verdict. Under the circumstances, we are not satisfied of reversible error in the refusal to grant a new venire.

All the assignments are overruled and the judgment is affirmed.

Schotter, Appellant, v. Carnegie Steel Co.

Contract—Master and servant—Compensation—Allotments of stock—"Voluntarily quit" employment.

1. Where a contract of employment between a corporation and one of its employees provides that the employee should have the right to participate as "special compensation to employees under bonus plan," in allotments of stock, but that this right should be forfeited if the employee should voluntarily quit the company's service within five years, the right is forfeited if the contract of employment is terminated by mutual consent within five years.

2. To "voluntarily quit" the employment, means to quit without coercion or compulsion.

Argued October 18, 1921. Appeal, No. 197, Oct. T., 1921, by plaintiff, from judgment of C. P. Allegheny Co., July T., 1919, No. 1402, on verdict for defendant, in case of H. I. Schotter v. Carnegie Steel Co. Before FRAZER, WALLING, SIMPSON, KEPHART and SCHAFFER, JJ. Affirmed.

Assumpsit for breach of contract.

Verdict for defendant by direction of court.

On a motion for a new trial, the following opinion was filed by CARPENTER, J.:

"A verdict for defendant having been rendered pursuant to instructions, the plaintiff moves for a new trial. The controlling facts are not disputed, and, for the purposes of the present discussion, we might exclude all testimony offered by defendant. The plaintiff did not attempt to color or conceal any material fact for the

purpose of strengthening his case. Briefly stated, his claim is that he held a position as employee of the defendant which entitled him to a bonus in addition to his salary. He avers that under the allotments of stock as 'special compensation under bonus plan,' he became entitled to stock which was not delivered and which is of great value. The allotments had certain conditions attached thereto, only one of which, the third, is here involved. This condition provided, *inter alia*, that if the person to whom was allotted the bonus mentioned should 'voluntarily quit' the employment of the company within a period specified [the figures show, and it is agreed, the period was five years] he should forfeit all right to the bonus stock. It is admitted that plaintiff did not remain with defendant for the five years next following the dates on which the provisional certificates, showing his allotment, were issued; that he severed his connection with defendant company and entered the service of Midvale Steel & Ordnance Corporation, and that he subsequently returned his provisional certificates to defendant.

"Plaintiff's counsel states his contention as follows: 'The plaintiff contends that he did not "voluntarily" quit the employment of defendant so as to effect a forfeiture of his stock under the terms of the allotment, but that his employment was terminated by mutual agreement with defendant, and that his right to the stock was thereby not affected.'

"That the testimony shows conclusively a termination of the employment by mutual consent cannot be doubted. It is undisputed that after Mr. Dinkey of the Midvale Company offered the plaintiff a position in that company, he, Mr. Schotter, talked with Mr. Williams of the Carnegie Company. His own statement of the conversation, given in answer to a question requesting him to state all that transpired, was:

"The outcome of the conversation was, of the mutual conference we had, that Mr. Williams, as I say, stated

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as a friend and as an official, he didn't see—he simply advised, in other words [this] is what I say,—he simply advised that under all the circumstances [I] accept the position offered. However, I said, "Now, Dan, as a friend and as an official of long connection with the Carnegie Steel Company, if you wish me to stay, I am perfectly willing, because, I repeat, I am not so sure that I want to sever connection with the Carnegie Steel Company, or I will stay as long as you would like me to." He said, "You can arrange at any time that you care to," and asked me who I would advise becoming my successor in the position as general superintendent of the city mills.'

"On cross-examination he testified as follows: 'I consulted Mr. Williams first before I left because I was not sure that I wanted to leave the Carnegie Steel Company, and it was only after consulting and his advice to me that he certainly would accept the position had it been offered him and under those circumstances did not see how I could do anything else but accept the position and it would be perfectly satisfactory to him. So it was by mutual consent that the connection was severed.'

"Other evidence to the same effect might be quoted, but we deem it unnecessary.

"It is earnestly contended by plaintiff's counsel that the evidence does not warrant the conclusion that plaintiff 'voluntarily quit' his employment with defendant, and he quotes numerous definitions of both words, to sustain his contention. To 'quit' the service of another means to abandon it, and to do so 'voluntarily' means to quit without coercion or compulsion. To say that because a man hesitates, seeks advice, before acting, he does not act voluntarily, is to say that if he thinks before he acts he is not responsible for the consequences. The very fact that he hesitates negatives the idea that his act was without consideration, was not voluntary. We are unable to find any evidence which lends even slight support to plaintiff's contention.

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“New trial refused.”

Judgment for defendant. Plaintiff appealed.

Error assigned was direction of verdict for defendant, quoting record.

U. G. Vogan, with him *C. F. Patterson*, for appellant.

David A. Reed, of *Reed, Smith, Shaw & Beal*, for appellee, was not heard.

PER CURIAM, January 3, 1922:

The judgment in this case is affirmed on the opinion of the learned judge of the court below.

Butler County National Bank v. St. Michael's
Greek Catholic Church.

Mortgage—Bond—Judgments—Assignments—Petition to compel assignment.

A bank holding a mortgage, bond and two junior judgments against a corporation, will not be compelled to assign them, in payment of the mortgage debt and interest thereon, to certain parties, who deny the validity of the two judgments, where other parties interested in the church offer to pay the entire indebtedness of the church, including the two judgments.

Argued October 20, 1921. Appeal, No. 37, Oct. T., 1921, by Rev. Peter Poniatishin, from decree of C. P. Butler Co., Sept. T., 1920, No. 82, dismissing petition for an order to assign to petitioner a mortgage and bond, in case of Butler County National Bank v. St. Michael's Greek Catholic Church et al. Before MOSCHZISKER, C. J., FRAZER, WALLING, SIMPSON, KEPHART, SADLER and SCHAFFER, JJ. Affirmed.

Petition for order to assign mortgage and bond. Before REIBER, J.

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The opinion of the Supreme Court states the facts.

Petition dismissed. Rev. Peter Poniatishin appealed.

Error assigned was decree, quoting it.

E. J. McKenna, of McKenna & McKenna, and James M. Galbreath, for appellant, cited: *Lyon's App.*, 61 Pa. 15; *Hopkins Mfg. Co. v. Ketterer*, 237 Pa. 285.

Charles H. Miller, for appellee.

OPINION BY MR. JUSTICE SCHAFER, January 3, 1922:

This is part of the litigation growing out of differences between members of St. Michael's Greek Catholic Church, other phases of which have been before us in *Chrapko v. Kobasa*, 271 Pa. 447, and *Bungar v. St. Michael's Greek Catholic Church*, 272 Pa. 402, *supra*.

There is a mortgage on the church for \$7,000, held by the Butler County National Bank; it also holds two judgments aggregating \$2,500, which are liens on the church property.

Peter Poniatishin, administrator of the Greek Catholic Church in the United States, presented his petition to the court below, praying for an order directing the Butler County National Bank to assign its mortgage, and the accompanying bond, together with the judgment entered on it, to him, on payment of debt, interest and costs; the bank filed an answer denying the right to the relief sought, the court refused to make the order, and petitioner has appealed.

Counsel for appellant, in their argument, admit the cases are rare where the court will order a mortgagee, on payment of the debt it secures, to assign a mortgage; and this is certainly not one of them, for a most sufficient reason. John Bungar and others, trustees of the church, presented a similar petition, praying for a like order, coupled with a statement of their intention to pay the entire indebtedness of the church, which would

include the bank's two judgments; there was not only no such offer from appellant, so far as payment of the judgments is concerned, but, in answer to Bungar's petition, appellant denied the validity of the additional judgments held by the bank. It would be a manifest injustice to the bank to require it to turn over its first mortgage to one who denies the validity of other and junior liens held by it.

The order is affirmed at the cost of the appellant.

McNulty Bros. Co., Appellant, v. Pennsylvania R. R. Co. et al.

Mechanic's lien—Railroad buildings—Office building—Freight station—Function of court and jury.

1. Where a railroad company builds under one contract and at one time a freight station and an office building firmly fastened together with communicating doors and passages, and the primary purpose is a freight station with an office building for the convenience of the employees of the freight station, the building is one structure, and a mechanic's lien cannot be filed against a part of it.

2. Nor can a mechanic's lien be filed against the building as an entirety, where it appears that the building is necessary for the exercise of the corporate franchises of the railroad company.

3. The necessity is not an absolute but a reasonable necessity,—i. e., property which is reasonably necessary in carrying out the purposes of the public service corporation with the greatest facility and convenience to itself and the public.

4. The structure remains a railroad freight office building notwithstanding the fact that the first floor comprises store rooms, which, with their basements, are rented for business purposes.

5. Such building cannot be sold on a writ of *levari facias*.

6. Where the object of the structure and the uses made of it do not depend upon the credibility of witnesses, but upon all the evidence, oral and written, of both sides, and no controlling fact is in controversy, it is the duty of the court to pass upon the case, and not submit it to the jury.

McNULTY BROS. CO., Appel., v. PA. R. R. CO. et al. 443
1922.] Statement of Facts—Arguments.

Argued October 20, 1921. Appeal, No. 193, Oct. T., 1921, by plaintiff, from judgment of C. P. Allegheny Co., Oct. T., 1917, No. 1092, for defendant n. o. v., in case of McNulty Bros. Co. v. Pennsylvania R. R. Co. et al. Before MOSCHZISKE, C. J., WALLING, KEPHART, SADLER and SCHAFER, JJ. Affirmed.

Scire facias sur mechanic's lien. Before STONE, J.
The opinion of the Supreme Court states the facts.
Verdict for plaintiff. Judgment for defendant n. o. v.
Plaintiff appealed.

Error assigned was judgment, quoting it.

Geo. H. Rankin, for appellant.—The case was for the jury: *Wilson v. R. R.*, 177 Pa. 503; *Hyatt v. Johnston*, 91 Pa. 196; *Reel v. Elder*, 62 Pa. 308; *Lehigh C. & N. Co. v. Evans*, 176 Pa. 28; *Newman v. Romanelli*, 244 Pa. 147; *Lautner v. Kann*, 184 Pa. 334; *Anderson v. Rys.*, 251 Pa. 517; *Lipsky v. Stolzer*, 236 Pa. 151.

The building was a structure within the meaning of the mechanic's lien law: *Munger v. Silsbee*, 64 Pa. 454; *Todd v. Gernert*, 223 Pa. 103.

The building was not necessary and essential for the operation of the railroad: *Plymouth R. R. v. Colwell*, 39 Pa. 227; *Shamokin Val. & P. R. R. v. Livermore*, 47 Pa. 465; *Del., L. & W. R. R. v. Tobyhanna Co.*, 232 Pa. 76; *Robinson v. R. R.*, 161 Pa. 561; *Este v. R. R.*, 27 Pa. Superior Ct. 521.

James R. Miller, of *Patterson, Crawford & Miller*, for appellee.—The undisputed evidence showed that a substantial portion of the so-called office building was and always had been occupied by the operating force of the whole freight station plant, and this appropriation and use determines the question of essentiality and necessity: *Plymouth R. R. v. Colwell*, 39 Pa. 337; *Shamokin Val. R. R. v. Livermore*, 47 Pa. 465; *Foster v. Fowler*, 60 Pa. 27.

There was no abuse of discretion on the part of the directors of the railroad as to the uses to which the building was to be put: *Anspach v. R. R.*, 5 Phila. 491.

OPINION BY MR. JUSTICE WALLING, January 3, 1922:

In 1914 the defendant railroad company let a contract to J. E. & A. L. Pennock for the construction of a freight station and office building on the southeast corner of Federal and North Canal streets, Pittsburgh, and the plaintiff, McNulty Brothers Company, had a subcontract for the plastering. The contractors failed and plaintiff filed a mechanic's lien against the office building for work done and material furnished in its construction; this suit is a *scire facias* issued on said lien. The jury found for the plaintiff, but later the court in banc entered judgment for defendant n. o. v.; from which plaintiff brought this appeal.

The office building is three stories high above the basement and faces one hundred and ten feet on the east side of Federal Street and extends east forty feet on the south side of North Canal Street; while the freight station proper is attached to and extends from the office building about nine hundred feet along the south side of North Canal Street. Our first question is, did the court below err in holding the two parts constitute one building? This must be answered in the negative. They were built at one time, under one contract and for one primary purpose, to wit, a freight station. They are firmly fastened together, and, where they join, rest on the same columns and the same wall, with doors in the latter which afford inside passage ways from one to the other, and they are heated by a single plant, located in the freight station. The main purpose of the office building, so-called, was to afford convenient working rooms and accommodations for the freight agent, the chief clerk, the cashier and all other officers and clerical employees of the freight station, who number from forty to fifty-five and occupy the entire second

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floor of the office building, and are without other adequate office accommodations. The second and third floors of the office building are partitioned into offices, while the first floor comprises six store rooms, which, with their respective basements, are rented for business purposes. The office building is slightly higher and presents a different and more pleasing external appearance than the freight station, but these facts do not render it a separate structure. Being one building, a mechanic's lien cannot be sustained against a part of it.

The next question is, Can a mechanic's lien be sustained against the office building considered as an entirety? This must also be answered in the negative. Such lien is valid only so far as it can be enforced (*Foster v. Fowler*, 60 Pa. 27; *Vulcanite Paving Co. v. Rapid Transit Co.*, 220 Pa. 603, 608) and the only method of enforcement is by a sale of the property on a writ of *levari facias*: *Guest v. Water Co.*, 142 Pa. 610, 615. But defendant railroad company is a public service corporation and no property reasonably necessary to the enjoyment and operation of its franchise can be sold on such writ: *Margo v. Penna. R. R.* (No. 2), 213 Pa. 468. In other words, the necessary property of such corporation cannot be sold away from it piecemeal, and "the necessity is not an absolute one; it is a reasonable necessity taking into consideration the character of the service rendered by the corporation" (*Bell Tel. Co. Pa. v. Harrisburg*, 53 Pa. Superior Ct. 458, 462); or, to quote the language of Judge EVANS in the case of another mechanic's lien filed against this entire freight station: "The expression, 'property essential to a public service corporation,' so frequently used by the court is not an absolute necessity, but a reasonable necessity. It is property which is reasonably necessary in carrying out the purposes of the public service corporation with the greatest facility and convenience to itself and the public": *Willis Mfg. Co. v. Penna. R. R. Co.*, 66 Pitts. L. J. 223. It must be property reasonably essential to

the exercise of the corporation's franchise: *Reynolds v. Reynolds Lumber Co.*, 169 Pa. 626. It follows from the facts above stated that the office building, attached to the freight house, is reasonably necessary to the defendant in the exercise of its corporate franchise and, hence, not liable to a mechanic's lien. And it still remains a railroad freight office building notwithstanding the use made of the store rooms and basement; the same as a hotel retains its character as such although space therein is rented for business purposes. Where as here the main object and purpose of the building is one necessary to the exercise of the corporate franchise, it does not lose its character as such because space therein is put to other uses.

That a building necessary to a public service corporation cannot be made the subject of a mechanic's lien is well settled. For example, the power house of an electric street railway is not subject to a mechanic's lien (*Vulcanite Paving Co. v. Phila. Rapid Transit Co.*, supra); nor are the necessary buildings or structures of a public water company: *Foster v. Fowler*, supra; *Guest v. Water Co.*, supra. Moreover, the toll house of a canal is exempt from taxation (*Navigation Co. v. Commissioners*, 11 Pa. 202), as are the works of an incorporated gas company: *West Chester Gas Co. v. County of Chester*, 30 Pa. 232. It is held by the Supreme Court of Missouri, in *Skrainka v. Rohan*, 18 Mo. App. 340, that a building erected by a railroad to be used as a freight depot and office rooms, is not subject to a mechanic's lien. Such lien is not analogous to a municipal claim where, under certain conditions, land may be sold subject to the easement of the public service corporation (*South Fork Boro. v. Penna. R. R. Co.*, 251 Pa. 261), nor to the case of an assessment for taxation where the value of the building may be apportioned according to the uses made thereof: *M. E. Church v. Phila.*, 266 Pa. 405; *Phila. v. Barber*, 160 Pa. 123.

Appellant contends with great earnestness that the burden was upon appellee to bring the case within the exemption and that it was done if at all by oral evidence which was for the jury. We recognize the force of this contention and have given it due consideration. The case, however, does not rest on the credibility of the oral testimony submitted by defendant, but on all the evidence of both sides, including plans, photographs, etc. While there may be some difference in the opinions of the witnesses, there is no controlling fact in controversy and nothing for a jury to pass upon. The object of the structure, the manner and purpose of its construction and the uses made of it appear from all the evidence, and it becomes the duty of the court to declare their legal effect.

The assignments of error are overruled and the judgment is affirmed.

Commonwealth ex rel. v. Tice, Appellant.

Municipalities—Controller—Refusal to countersign warrant—Ministerial capacity—Approval of bill for legal services by council—Presumption—Mandamus—Return, sufficiency of averments—Specific remedy at law—Attorney-at-law—Contract to lowest bidder.

1. In the absence of fraud, the validity of a claim for legal services approved by the council of a municipality, cannot be questioned by the controller. The presumption is that the mayor and council properly perform their duties.

2. It is not necessary for an attorney-at-law to present an itemized bill for legal services rendered to a municipality, and this is specially the case when they are rendered in the preparation and trial of a single case.

3. In doing the routine work of passing accounts, countersigning warrants, etc., the controller acts in a ministerial capacity, and may be compelled to perform such duty by mandamus.

4. Where a warrant is presented to a controller thirty days before the return to a writ of mandamus, an averment in the return that there is at the present time no money in the treasury legally

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applicable for the payment of the same, is insufficient, as there may have been money in the treasury when the warrant was presented.

5. In a mandamus proceeding to compel a city controller to countersign a warrant approved by councils, an averment of an adequate and specific remedy at law cannot be sustained.

6. A statute requiring municipal contracts for supplies, etc., to be let to the lowest responsible bidder, is not applicable to an employment for legal services.

Argued October 21, 1921. Appeal, No. 18, Jan. T., 1922, by defendant, from order of C. P. Northampton Co., Feb. T., 1920, No. 34, sustaining demurrer to return to writ of mandamus, in case of Commonwealth ex rel. Owen J. Roberts v. Victor E. Tice, City Controller of the City of Bethlehem. Before MOSCHZISKE, C. J., WALLING, SIMPSON, KEPHART, SADLER and SCHAFER, JJ. Affirmed.

Petition for writ of mandamus. Before McKEEN, J.

The opinion of the Supreme Court states the facts.

The court sustained a demurrer to return to writ. Defendant appealed.

Error assigned, inter alia, was order, quoting it.

George R. Booth, for appellant.—It is plainly the duty of the controller with due discrimination to determine what “objects” are “authorized by law” for the appropriation of the city’s money, and he is guilty of a misdemeanor in office if he does not do so: *Dechert v. Com.*, 113 Pa. 229.

No public official can be mandamusd to do a wrongful or illegal act: *Edison Electric Co. v. Jacobs*, 8 Kulp 120; *Sterrett v. Elect. Rep. Co.*, 3 Pa. C. C. R. 553; *Runkle v. Com.*, 97 Pa. 328; *Dechert v. Com.*, 113 Pa. 229.

A mandamus was not properly issued in this case because plaintiff had an adequate and specific remedy at

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law: Com. v. George, 148 Pa. 463; Com. v. City Controller, 7 Phila. 29; Com. ex rel. Tower v. Thompson, 86 Pa. 442; Com. ex rel. Century Co. v. Phila., 176 Pa. 588; Carlisle School Dist. v. Humrich, 18 Pa. C. C. R. 322; Reading v. Com., 11 Pa. 196.

Dallett H. Wilson, with him *Robert A. Hamilton*, for appellee.—Mandamus lies to enforce the performance by public officers of ministerial as distinguished from discretionary duties: *Vare v. Walton*, 236 Pa. 467; Com. ex rel. v. Repp, 242 Pa. 240.

The action of the mayor and city council in approving the bill of *Owen J. Roberts*, and making proper provision for the payment thereof, created a valid debt of the City of Bethlehem: *Phila. v. Flanigen*, 47 Pa. 21; *Phila. v. Johnson*, 47 Pa. 382; *Silsby Mfg. Co. v. Allentown*, 153 Pa. 319.

The duties of the controller in cities of the third class as to the countersigning of warrants are ministerial only: Com. ex rel. v. George, 148 Pa. 463; *Flick v. Harpham*, 3 Pa. Dist. R. 568.

The return of the city controller is insufficient to prevent the issuance of a peremptory writ of mandamus: *Kell v. Rudy*, 1 Pa. Superior Ct. 507; *Douglas v. McLean*, 25 Pa. Superior Ct. 9.

The only mode of paying demands against a city is by warrants drawn by the proper city authorities upon the city treasurer.

OPINION BY MR. JUSTICE WALLING, January 3, 1922:

Bethlehem is a city of the third class and the assessment made in 1918 of its real estate, for city tax purposes, gave such dissatisfaction that it resulted in over seven hundred appeals and also in the filing of a bill in equity to restrain the collection of the city's entire tax levy. At the request of the city solicitor, the council, by unanimous action, employed the relator, *Owen J. Roberts, Esq.*, of the Philadelphia Bar, to assist in the

defense of the equity suit, which, after several months' litigation, was won by the city. Thereafter, the relator presented a bill of \$8,000 for his services, which was approved by the city solicitor, the mayor and council. The latter by unanimous resolution authorized and directed the superintendent of accounts and finance to borrow the amount on the credit of the city, and, with like unanimity, duly enacted an ordinance appropriating \$8,000 to the payment of the bill in question. This being done, the superintendent of accounts and finance drew a warrant upon the city treasurer for the payment thereof and presented it to the defendant as city controller to examine, audit and settle the account and countersign the warrant. This the controller refused to do and called for an itemized statement of the relator's services and proof of their value, etc. Thereupon, the relator filed his petition in this case praying for a writ of mandamus commanding the controller to perform the services in question. The latter filed his return, but plaintiff's demurrer thereto was sustained by the trial court, from whose order awarding a writ of peremptory mandamus defendant brought this appeal.

The amount of compensation for the services rendered was not fixed in advance, and defendant avers it is not his duty to audit the account, or countersign the warrant, until fully satisfied from evidence furnished by plaintiff that the amount is just, proper, legal and reasonable; also that in such cases the controller acts in a judicial capacity and is not subject to mandamus. Neither contention is tenable. The council is the governing body of the city (*City of Philadelphia v. Flanigan*, 47 Pa. 21), and, in the absence of fraud, which is not here alleged, the controller cannot challenge the validity of a claim duly allowed by that body; otherwise he would be above the council and could in effect veto their acts. There is a presumption, not here rebutted, that the mayor and council properly performed their duties: 2 Dillon on Municipal Corporations (5th

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ed.), p. 1294, section 855. Moreover, that in doing the routine work of passing accounts, countersigning warrants, etc., the controller acts in a ministerial capacity and may be compelled to perform such duty by mandamus has been repeatedly decided by this court. In *Com. ex rel. v. Phila.*, 176 Pa. 588, 592, the controller refused to countersign the warrant for payment of books purchased by the board of education because of the alleged improvidence of the contract. Mr. Justice MITCHELL, speaking for the court, says (p. 592): "What books, including what bindings are suitable for the public school service is not to be determined by him [the controller] but by the board of education. He is not intrusted with the duty of making, or even of supervising the contracts of other departments. He is the city's head bookkeeper, and his office is to see that the various departments do not exceed their appropriations, nor apply them to purposes not within their proper scope. To this end, he is clothed with very large powers of examination and investigation, and a large measure of discretion, but they do not extend to the revision of lawful contracts made by other departments within their proper sphere. This reason presents no excuse whatever for refusal to countersign the warrant." This is expressly reaffirmed in *Com. ex rel. v. Larkin*, 216 Pa. 128, where, in delivering the opinion of the court, our late Brother STEWART adds, "If the contract be on its face regular, and the requirements of the statutes in connection therewith have been fully met, the controller is without choice in the matter; it becomes at once his duty in such cases to number the contract according to its date, charge it against the proper item of appropriation, and certify it accordingly. No opinion or so-called discretion of the controller can justify him in withholding his certificate from such a contract." *Com. ex rel. v. Walton*, 236 Pa. 220, holds that where the mayor and council have directed expenditures for matters within their jurisdiction, the city controller cannot

refuse to countersign warrants drawn in payment thereof; to like effect is *Vare v. Walton*, 236 Pa. 467. In *Com. ex rel. v. Pittsburgh*, 183 Pa. 202, *Com. v. Kilpatrick*, 204 Pa. 218, and *Com. ex rel. v. Pittsburgh*, 206 Pa. 379, the city controller was compelled by mandamus to countersign warrants for the payment of claims against the city when approved by the proper authorities. See also *Nicely v. Raker*, 250 Pa. 386. The duty of the city controller to countersign contracts is also ministerial and will be enforced by mandamus: *Com. ex rel. v. George*, 148 Pa. 463.

In view of these conclusive authorities we deem it unnecessary to review the various statutes relating to city controllers. Here, plaintiff had an admittedly valid claim against the city for legal services, the only question being the amount, and that was adjusted when council accepted his bill and ordered it paid. The advisability of recognizing, or adjusting, the amount of a valid claim against the city rests with the council: see *Doverspike v. Magee*, 51 Pa. Superior Ct. 525. It is not necessary for an attorney to present an itemized bill for his services (*Com. v. T. & M. Bank of Pittsburgh*, 246 Pa. 519), especially when rendered in the preparation and trial of a single cause. The responsibility of adjusting the amount of plaintiff's fees rested upon the city council, and the fact that defendant was not satisfied the amount was reasonable afforded no justification for his refusal to countersign the warrant.

The warrant was presented to defendant for his signature thirty days before he made his return to the writ of mandamus, and, while the return avers, "there is at the present time no money in the treasury of the City of Bethlehem legally applicable for the payment of the same," no averment is made that such money was not in the treasury when the warrant was presented to him, and that was the important fact; hence, there is no sufficient averment of lack of funds in the treasury to excuse defendant's failure to countersign the warrant.

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The petition avers the lack of other and specific remedy at law; this is denied in the return and raises a legal question. What plaintiff seeks is the performance of an affirmative act by the defendant; this could not be secured by an action at law against the city. In fact, such action would be vain, inasmuch as the proper city authorities have approved plaintiff's bill and directed its payment; therefore, the averment of another adequate and specific remedy at law cannot be sustained.

The statute requiring that municipal contracts for supplies, etc., be let to the lowest responsible bidder manifestly is not applicable to an employment for legal services.

The assignments of error are overruled and the order, entering judgment for the relator on the demurrer to the return and directing that a peremptory mandamus issue, is affirmed at the cost of appellant.

Mt. Calvary Methodist Protestant Church Trustees.

Church law—Inactive or extinct church—Appointment of trustee—Findings of fact—Appeal—Acts of June 5, 1913, P. L. 435; April 18, 1919, P. L. 72, May 17, 1921, P. L. 861—Cemeteries—Burial grounds—Sale.

1. In a proceeding under the Act of June 5, 1913, P. L. 435, to appoint a trustee for a church alleged to have become inactive or extinct, a finding by a court below on sufficient evidence that the church has not become inactive, or extinct, but is under control of active trustees, although it has no church building, is, under the Act of April 18, 1919, P. L. 72, entitled to the same weight as the verdict of a jury and such finding will not be reversed on appeal.

2. Such church property when used as a cemetery, cannot be sold, unless the sale is authorized by statute; the Act of June 5, 1913, P. L. 435, and amendment of May 17, 1921, P. L. 861, make no provision for sale.

454 MT. CALVARY METHODIST P. CHURCH TRUSTEES.

Statement of Facts—Opinion of the Court. [272 Pa.

Argued October 21, 1921. Appeal, No. 192, Oct. T., 1921, by C. S. Sanders et al., petitioners, from decree of C. P. Clarion Co., May T., 1921, No. 79, dismissing petition for appointment of trustees, in the matter of Mt. Calvary Methodist Protestant Church. Before MOSCHIZISKER, C. J., WALLING, SIMPSON, KEPHART, SADLER and SCHAEFFER, JJ. Affirmed.

Petition for appointment of trustees of a church under Act of June 5, 1913, P. L. 435. Before SLOAN, J.

The opinion of the Supreme Court states the facts.

Petition dismissed. C. S. Sanders et al., petitioners, appealed.

Error assigned, among others, was decree, quoting it.

John P. Patterson, with him *Geo. F. Whitmer*, for appellant.—Mt. Calvary Methodist Protestant Church, under the evidence in this case, has (a) no active or resident trustees representing it, and (b) is both inactive and extinct in fact: *Jones v. Renshaw*, 130 Pa. 327; *St. John's Church v. Hanns*, 31 Pa. 9; *Fidelity Ins. Co.'s App.*, 99 Pa. 443.

H. M. Rimer and *Don C. Corbett*, with them *A. A. Geary*, *H. E. Rugh* and *F. J. Maffett*, for appellees, cited, as to cemeteries: *Brown v. Lutheran Church*, 23 Pa. 495; *Brendele v. Congregation*, 33 Pa. 415.

OPINION BY MR. JUSTICE WALLING, January 3, 1922:

In 1856 Jacob Eshleman and wife gave a deed to Martin Bradley and Solomon Cyphert, Jr., trustees of the Methodist Protestant Church, for a described plat of one hundred and fifty-six perches of land in Limestone Township, Clarion County, in trust for the church. About that time a log church building was erected thereon, which was later replaced by a frame building and each in its turn used as a house of worship by a local un-

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incorporated religious society of that denomination, known as Mt. Calvary Methodist Protestant Church, until the frame building was destroyed by fire in August, 1907. The society was attached to the Pittsburgh Annual Conference, but has had no church building since the fire; however, for two years thereafter services were held occasionally in a private residence. These were discontinued for lack of a pastor, which the conference declined to supply at or after the annual meeting in 1908; however, the society continued from time to time to hold Sunday school in a private dwelling or school-house. By the law of the church, the trustees hold office for one year and until their successors are elected. The three trustees of this society were regularly chosen at its annual meeting shortly before the fire, one of whom is still a trustee. Meetings of the congregation were held thereafter, but not yearly, at which trustees were elected, and at such a meeting held in 1914, after public notice, the respondents were chosen as trustees; and, having been reëlected, are now serving as such. That year (1914) respondent gave a lease of the lot for oil and gas purposes, resulting in a well being drilled thereon which produces gas in paying quantities. From this they are entitled to receive, and until the question of title arose did receive, \$225 a year. The church society now has about twenty-four members and the question of rebuilding the church has been discussed but never brought to a successful issue.

This lot has also been used continuously as a cemetery since 1852, and the remains of from sixty to one hundred persons are there interred, the graves being scattered over the lot, except where the church building stood. There is no other cemetery within three or four miles and some, not affiliated with this congregation, have buried their dead there by permission of the church trustees, who have ever been and are in charge of the cemetery.

Since the fire, the annual conference has discouraged any effort to renew this church; partly because of its lack of numerical and financial strength and partly because of the establishment of a Methodist Episcopal Church at Kingsville, two miles away, which some members of Mt. Calvary Church have joined. The latter has not sent a delegate nor made a contribution to the annual conference since 1908. The conference, however, took the position that Mt. Calvary Church had become inactive and extinct and that its property belonged to the general church of which the Board of Church Extension was the proper custodian. The resident trustees (respondents) declined to recognize such contention and the annual conference in 1917 brought an ejectment suit for the lot, but was defeated on the ground that its remedy was to proceed for the appointment of trustees as provided in the Act of June 5, 1913, P. L. 435: Pittsburgh A. C. of M. P. Church v. Cyphert, 268 Pa. 322. This petition on behalf of the annual conference was thereupon filed in the court below, to which a responsive answer was made and testimony taken on each side. The trial court found all the controlling facts in favor of respondents and dismissed the petition; hence, this appeal by petitioners.

We find nothing in the record that calls for a reversal. Section 1 of the Act of 1913, *supra*, provides: "That when any individual church shall become inactive or extinct, by reason of there being no resident or active trustees representing it, or otherwise, the court of common pleas of the county wherein said church is located may appoint as trustees of said church the trustees of the state body or organization representative of the denomination of which said church was a member, to hold and dispose of the title to the property of said church"; and section 2 provides, *inter alia*, that, "upon full hearing of the matter [the court] shall make such order in the case as shall be most likely to preserve the property of said church, in the interests of the denomi-

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nation within the State." The trial court found Mt. Calvary Church was neither inactive nor extinct, but under the management and control of active resident trustees who were properly conserving the church property; also that the royalty from the gas well was needed for the care of the lot and erection of necessary buildings thereon. Inasmuch as there is evidence to support these findings, we cannot reverse because upon all the evidence the facts might have been found otherwise. In this, as in an equity case, the findings of facts by the court below are entitled to the same weight as the verdict of a jury. The Act of April 18, 1919, P. L. 72, which makes the evidence a part of the record in the appellate court, in effect so provides. Thereunder we are not required to overrule findings which have evidence to sustain them: *Hand's Case*, 266 Pa. 277, 281.

The members constitute the individual church, which does not cease to be, merely by loss of the meetinghouse, and the provision in the church constitution, that a church shall be regarded as extinct when there are not sufficient members to fill the offices, has no application here because there are more than sufficient members for that purpose.

The findings, to which we have referred, justified the dismissal of the petition; moreover, the dedication and use of the lot as a cemetery was conclusively established, and neither the original Act of 1913, nor the amendment of May 17, 1921, P. L. 861, makes provision for the appointment of trustees to hold and dispose of the title to cemetery property; hence, the court has thereunder no such right, whatever its power may be to appoint trustees for other church property. Except as provided by statute, land dedicated for and used as a burying ground cannot be sold: *Brown v. Lutheran Church*, 23 Pa. 495; *Gumbert's App.*, 110 Pa. 496; *Chew v. First Presbyterian Church*, 237 Fed. 219.

The assignments of error are overruled and the order is affirmed at the cost of appellants.

Osterling, Appellant, v. Allegheny County.

Municipal contracts—County courthouse—Alterations—Commissions—Reduction—Consideration—Architect—Approval of contract by grand jury and quarter sessions—Amendment of statement—Quantum meruit—Statute of limitations—Act of April 15, 1834, P. L. 539.

1. County commissioners have no authority to enter into a contract with an architect to furnish plans and specifications and superintend additions and alterations to an existing courthouse, prior to securing the approval of the grand jury and court of quarter sessions to such additions and alterations, as required by the Act of April 15, 1834, P. L. 537, 539.

2. An agreement for drawings, plans, specifications, contracts and general supervision of the work, is for a part of the enlargement of the building as much as any other work or material.

3. Where the architect brings an action against the county on such a contract, he cannot amend his statement by adding a claim on a quantum meruit for the preparation of plans and specifications for the information of the grand jury, if it appears that the claim is not brought upon the record until thirteen years after the work was done, as the statute of limitations has then run.

4. If the suit involves additions and alterations to a county jail, and they were properly authorized, the architect may recover for his services thus rendered.

5. Where it appears that, at the architect's request, a change of material for the jail was made involving a large increased cost to the county, an agreement by the architect to reduce his commissions from the amount stated in the contract, is based on a sufficient consideration.

6. Where the county calls a witness who testifies that the architect agreed to reduce his commission to either two or two and one-half per cent, but that he could not recall which, the architect should be allowed two and one-half per cent instead of two per cent.

7. The cost of removal of old buildings and the cost of testing steel, both necessary for the construction work, are properly a part of the cost of the improvement on which the architect is allowed commissions.

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Syllabus—Arguments.

Appeals—Modification of judgment—Acts of May 20, 1891, P. L. 101, and April 22, 1905, P. L. 286.

8. Where the Supreme Court on appeal allows certain items of increase to the amount of the verdict for plaintiff and it appears that the questions involved in the items are purely legal, the judgment will be entered, in accordance with the Acts of May 20, 1891, P. L. 101, and April 22, 1905, P. L. 286, as the court below should have entered it.

Argued October 21, 1921. Appeal, No. 168, Oct. T., 1921, by plaintiff, from judgment of C. P. Allegheny Co., July T., 1911, No. 429, on verdict for plaintiff, in case of F. J. Osterling v. Allegheny County. Before MOSCH-ZISKER, C. J., WALLING, SIMPSON, KEPHAET, SADLER and SCHAFFER, JJ. Modified and affirmed.

Assumpsit by architect. Before CARPENTER, J.

The opinion of the Supreme Court states the facts.

Verdict and judgment for plaintiff for \$6,155.01. Plaintiff appealed.

Errors assigned, were various rulings and instructions, sufficiently appearing by the opinion of the Supreme Court, quoting the record.

J. M. Freeman, of *Watson & Freeman*, with him *Joseph F. Mayhugh* and *Ernest C. Irwin*, for appellant. —No consideration was proved to support an agreement on plaintiff's part to modify his contract: *Kidder v. Kidder*, 33 Pa. 268; *McNutt v. Loney*, 153 Pa. 281; *Erny v. Sauer*, 234 Pa. 330.

The county commissioners had power to make the contract: *Vankirk v. Clark*, 16 S. & R. 286; *Cooper v. Lampeter Twp.*, 8 Watts 125; *Allegheny Co. v. Western Pa. Hospital*, 48 Pa. 123.

Plans were necessary before presenting the matter to the grand jury and quarter sessions: *Mahon v. Luzerne Co.*, 197 Pa. 1; *Huntingdon County's App.*, 8 Pa. Superior Ct. 380; *Bradbury v. Burschell*, 220 Pa. 439.

Arguments—Opinion of the Court. [272 Pa.

Wm. C. Jacob, Assistant County Solicitor, with him *Oscar J. Taylor*, County Solicitor, and *B. B. McGinnis*, for appellee, cited: *Taylor v. Poor Dist.*, 50 Pa. Superior Ct. 317; *Grier Bros. v. Assurance Co.*, 183 Pa. 334.

OPINION BY MR. JUSTICE WALLING, January 3, 1922:

The plaintiff, F. J. Osterling, is an architect and, on April 12, 1904, submitted to the Allegheny County commissioners an offer as follows, viz: "I hereby propose to furnish the necessary plans and specifications for the additions and alterations to the Allegheny County courthouse and jail buildings for a commission of five (5%) per cent upon the cost of the work. The above commission to include general supervision of the work, all drawings, plans, specifications and contracts, and such duties as are usual and customary among architects. The above commission will also include my charges for the preliminary plans and studies prepared for the jail building, which were recommended by the special committee of the prison board. Payments to be made during the progress of the work, in the usual manner"; which they duly accepted the same day. Pursuant thereto plaintiff made detailed and complete plans and specifications for a comprehensive enlargement of the Allegheny County courthouse, to cost approximately \$1,500,000. The improvement was never made and plaintiff, after waiting five years, brought this suit, for his commission under the contract, but claimed only three per cent, as he was spared the work of supervision. The question of enlarging the courthouse was not submitted to or approved by the grand jury or court of quarter sessions as required by section 11 of the Act of April 15, 1834, P. L. 537, 539, which is as follows, viz: "It shall be the duty of the commissioners of every county to keep and maintain the public buildings aforesaid of the county, in suitable and convenient order and repair, and it shall be lawful for them when necessary, having first obtained the approbation of the grand jury,

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and of the court of quarter sessions of the county, to alter, add to, or enlarge such public buildings." Such omission was fatal to plaintiff's claim for the courthouse plans. Under the plain language of the act the approbation of the grand jury and court is prerequisite to the right of the commissioners to enlarge a county building (see *Taylor v. Poor District*, 50 Pa. Superior Ct. 317), and all persons are bound to recognize such lack of authority. This case differs from *Sauer v. McKees Rocks Sch. Dist.*, 243 Pa. 294, and *Harlow v. Beaver Falls Borough*, 188 Pa. 263, where the original contracts were valid when made. As the commissioners cannot enlarge the building, they cannot make contracts for that purpose, without such precedent authority. An agreement for all drawings, plans, specifications, contracts and general supervision of the work is for a part of the enlargement of the building as much as any other work or material. The law recognizes such services (when, as here, they include supervision) as part of the construction work for which an architect may file a mechanic's lien: *Trickett's Law of Liens in Pa.*, vol. 1, sec. 9; *Johnson's Law of Mechanics' Liens in Pa.*, p. 173.

The contention that under the contract plaintiff might recover as for a preliminary sketch is untenable. The contract affords no ground for such a contention, nor does the original statement of claim. True, the amended statement filed in 1918, while not abandoning the original contract, avers work done by plaintiff of the fair and reasonable price of \$45,000 in the preparation of plans and drawings necessary for the information of the grand jury. This cannot be sustained under the contract, for, as above stated, it was invalid, and furthermore it made no provision for preliminary plans or sketches of the courthouse. As a claim for the value of services rendered, independent of the contract, it cannot be sustained because barred by the statute of limitations, not having been brought upon the record until thirteen years after the work was done: *Grier Brothers*

v. Assurance Co., 183 Pa. 334. For these reasons it is not necessary here to determine to what extent the county commissioners may employ an architect to prepare preliminary sketches for information of the court and grand jury.

Complaint is made of the exclusion by the trial judge of offers of evidence tending to prove the extent and value of plaintiff's services in preparation of the courthouse plans. The offers were rightly rejected, (a) because there could be no recovery under the contract regardless of the amount of the services, and (b) because the claim on a quantum meruit, outside of the contract, was barred by the statute of limitations, and its extent immaterial.

The claim for the courthouse plans was properly rejected; however, the contract includes additions and alterations to the county jail, which were approved and made according to plaintiff's plans and under his supervision, and in this suit he also claimed a balance on that branch of the contract for commissions on certain disputed items. The jury found a verdict of \$6,155.01 for him, but he moved for a larger judgment n. o. v., and also for a new trial. The court below denied both motions and, from judgment entered on the verdict, plaintiff brought this appeal.

One controverted item grows out of the change of material of certain walls of the jail from sandstone to granite. This involved an extra expense of \$50,728, upon which plaintiff was prima facie entitled to his five per cent commission; but defendant proved by Judge MACFARLANE that, as a member of the prison board, he was present at a meeting attended by two of the county commissioners, by plaintiff and others, at which the question of the change of material was under consideration. The judge testified that plaintiff strongly urged the change, and, as an inducement thereto, said he would reduce his commission on the extra cost to two or to two and one-half per cent; the witness could not recall

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which amount. The change to granite was made and the trial judge submitted to the jury the question as to whether plaintiff made such an offer and if so to what percentage he agreed to reduce his commission; they allowed him two per cent on the extra cost. The added expense incurred by the county at plaintiff's request was a sufficient consideration for his promise and rendered the same obligatory. However, the trial judge erred in permitting the jury to reduce the amount to two per cent. The burden there was upon defendant, and as its witness did not recall whether the amount was to be two or two and one-half per cent, plaintiff was entitled to the latter sum.

The enlargement of the jail necessitated the acquisition of adjoining land and the removal of old buildings, which was done as part of the work under plaintiff's supervision, at a cost of \$3,750.50; the rejection of his commission thereon was error. Such removal was necessary to and, in fact, a part of the improvement and came fairly within the terms of the contract as part of the cost of "the work" for which a commission was provided. This conclusion finds support in *Ketcham v. Land Title & Trust Co.*, 257 Pa. 391, which holds, in effect, that where under one contract an old building is demolished and a new one erected on the same site, work done on the former becomes a part of the latter; and see 27 Cyc. 36.

The steel before being placed in the building was subjected to a physical test by the Pittsburgh testing laboratory at an expense of \$1,075.98, which added that sum to the cost of the improvement. While plaintiff had a general supervision over this work, he, of course, did not make the tests; however, it was error to reject his commission thereon, for it was as much a part of the cost of the building as any other item.

The questions involved in the three items above mentioned are purely legal, as the facts are admitted; hence, we can enter such judgment as the court below should

have entered: section 2, Act of May 20, 1891, P. L. 101; Act of April 22, 1905, P. L. 286. The commission, on the three items, with interest thereon to date of verdict, amounts to \$879.55.

The judgment is increased from \$6,155.01 to \$7,034.56, with interest from March 2, 1921, and, as so modified, is affirmed.

Munroe et al. v. Reliance Land Co., Appellant.

Contract—Sale of land—Conditions—Sale of stock of corporation—Costs divided.

1. Where a land company enters into an agreement to sell land, and in the agreement covenants that it will assist the purchaser "in obtaining subscriptions to twenty thousand shares of stock" of a company organized to take over the land and build thereon a manufacturing plant, and it appears that the plant could not be established on the land unless the money was raised by the sale of the stock, the condition is not fulfilled if the parties fail to obtain subscriptions for all the twenty thousand shares.

2. In such case assistance by the land company in the sale of part of the twenty thousand shares is not a compliance.

3. In this case the costs were divided between the parties.

Argued October 21, 1921. Appeal, No. 210, Oct. T., 1921, by Reliance Land Co., defendant, from decree of C. P. Allegheny Co., Jan. T., 1921, No. 966, on bill in equity, in case of J. Stewart Munroe et al., trading as J. S. Munroe & Co., v. Reliance Land Co. and R. F. Pitcairn. Before MOSCHZISKE, C. J., WALLING, SIMPSON, KEPHART, SADLER and SCHAFER, JJ. Affirmed.

Bill in equity for decree to terminate trust and pay over a fund. Before SHAFER, P. J.

The opinion of the Supreme Court states the facts.

Decree for plaintiffs. Reliance Land Co. appealed.

Error assigned, inter alia, was decree, quoting it.

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J. M. Wright, of Wright, Chalfant & McCandless,
with him *Russell J. Esler*, for appellant.

William A. Wilson, of Calvert, Thompson & Wilson,
with him *Herbert D. Lent, Jr.*, and *Watson & Freeman*,
for appellees.

OPINION BY MR. JUSTICE SCHAFER, January 3, 1922:

Munroe & Company are dealers in securities in the City of Pittsburgh; the Reliance Land Company is the owner of a tract of land suitable for manufacturing purposes, at Tarentum, in Allegheny County.

Munroe & Company were engaged by the Cabco Iron Works, a corporation located at Gowanda, New York, to aid in procuring for it a new manufacturing site in Allegheny County and in refinancing the enterprise. Munroe & Company learned of the Reliance Company's land, and opened up negotiations with persons interested in that concern, looking to the purchase of its real estate, the result of which was the execution of three written agreements. The construction of these documents is involved in this proceeding.

All the papers bear a like date, May 4, 1920, and the parties to them are the same, namely, Reliance Land Company and J. S. Munroe & Company. By the first of these writings, the Reliance Company agreed to execute and deliver a deed for the tract of land belonging to it, in consideration of which Munroe & Company were to transfer to the grantor shares of preferred and common stock of the Cabco Iron Works, and to assume other undertakings not necessary here to be set forth. The first contract contained this provision, "The said Reliance Company and its stockholders further agree to assist in obtaining subscriptions to twenty thousand shares of the preferred stock of Cabco Iron Works, Inc., a Delaware corporation, on or before May 15, 1920." The paper also provided, as a further consideration for its execution by the Reliance Company, that Munroe &

Company should deposit ten thousand dollars with a trustee named, to be delivered by him as the writing provided; this deposit was made. The clauses operating on the deposit specify that "In the event the [Reliance Company] carried out all its undertakings above referred to and [Munroe & Company] fail to purchase the property hereinbefore described, upon the terms and conditions of this agreement, said sum of ten thousand dollars shall be paid by the trustee to [the Reliance Company]," with a stipulation that the payment should be considered as liquidated damages to the Reliance Company. It is further provided that, if the Reliance Company and its stockholders fail to assist "in the securing of subscriptions for twenty thousand shares" of the preferred stock, or in the event that Munroe & Company purchase the property in accordance with the agreement, the trustee shall pay back the deposit of \$10,000 to them.

The second contract, after reciting the agreement just referred to,—that, as one of its considerations, the Reliance Company and its stockholders "agree to assist in obtaining subscriptions to twenty thousand shares of the preferred stock,"—provides how payments for stock shall be made and how stock certificates shall be delivered, if the transactions should go through. The third paper, called a supplementary agreement, recites the first agreement, and that a third party was endeavoring to collect a commission from the Reliance Company on the sale of the land. It stipulates that the paragraph in the original contract, relating to the failure by the Reliance Company to assist in the securing of subscriptions, should be modified, to provide, that, in the event of failure "to assist in the securing of subscriptions for twenty thousand shares," the trustee should pay over the \$10,000 in his hand to Munroe & Company, and, if they purchased the property, the trustee should retain the deposit, until the final disposition of the claim for commissions.

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By the joint efforts of Munroe & Company and those interested in the Reliance Company only 1,286 shares of stock were sold, and the project of establishing the plant of the iron company on the land of the Reliance Company fell through. Munroe & Company made demand on the trustee for the money they had deposited, and the Reliance Company also demanded it. Munroe & Company filed a bill in equity against the Reliance Company and the trustee, asking for a decree directing the latter to turn over the money in his hands to the plaintiffs; a cross-bill was filed by the Reliance Company, the prayer of which was to turn the deposit over to it. After hearing, the court below directed the money to be paid to Munroe & Company; from this decree the Reliance Company has appealed.

The case turns on the proper construction of the words in the agreements "to assist in obtaining subscriptions to twenty thousand shares of stock." The learned chancellor who heard the case construed the contract to mean that, if twenty thousand shares were subscribed for, with such assistance as the Reliance Company and its stockholders could give, the sale was to go on, otherwise the money was to be returned to Munroe & Company. With this conclusion we agree. The undertaking of the Reliance Company and its stockholders was to assist in selling twenty thousand shares, not in selling part of twenty thousand shares. The contention now made is that it is entitled to the \$10,000, if it and its stockholders assisted in the sale of part of twenty thousand shares. The difficulty with this position is that the agreements do not so provide. If their terms had been that the Reliance Company was "to assist in obtaining subscriptions to shares of stock," appellant's position might be tenable, but the language of the agreements is that they were "to assist in obtaining subscriptions to twenty thousand shares of stock." The sale of twenty thousand shares was to be the completed undertaking, and the vendees were not obligated to take the property

unless that number of shares were sold. Both parties were looking to the same end, the creation of the plant; it could not be established on the land unless the money was raised by the sale of stock. The Reliance Company, in requiring the deposit of \$10,000, was safeguarding itself against bad faith on the part of Munroe & Company if, after the sale of the stipulated number of shares in which the Reliance Company had assisted, Munroe & Company should fail to carry out their contract to purchase the land. Appellant is bound by the terms of the agreements as they are written; they cannot be strained to the meaning contended for, that the \$10,000 was to be forfeited to it if Munroe & Company, with such assistance as appellant and its stockholders rendered, did not succeed in selling the twenty thousand shares.

The decree is affirmed; costs to be paid one-half by the plaintiffs and one-half by the appellant.

Pasquinelli v. Southern Macaroni Mfg. Co., Appellant.

Foreign attachment—Plaintiff attaching money in his own hands—Quashing writ—Irregularity in record—Res adjudicata—Measure of damage for breach of warranty—Acts of April 26, 1917, P. L. 102, and April 18, 1919, P. L. 72—Appeals—Practice—Questions not raised below.

1. The plaintiff in foreign attachment may attach money in his own hands, but, if for any sufficient reason the attachment can be shown to be void in law, it may be quashed.

2. As a general rule writs of foreign attachment will not be quashed unless some fundamental irregularity appears in the record itself, and cases where this principle has been departed from will be found to present unusual features, which distinguish them from the rule as stated.

3. A motion to dissolve a foreign attachment is the proper practice, where the suit may remain as a pending action notwithstanding defects in the record.

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4. A motion to quash the writ is proper, where the defects depended on are fundamental in character and such as put plaintiff completely out of court.

5. Facts which will support a motion to quash the writ will sustain one to dissolve the attachment, but the reverse is not always true.

6. An applicant to quash a writ may not aver simply a defense on the merits, or a good legal answer to the alleged debt itself, he must point to some defect in the record which renders the proceeding fundamentally irregular and void.

7. If the most that is averred is a defense on the merits, or simply a good legal answer to the alleged debt itself, such a defense must be developed at the trial, unless an agreement on the facts, or something tantamount thereto, appears, which shows a case so fully developed that, if on trial, it would require binding instructions for defendant.

8. Under the Acts of April 26, 1917, P. L. 102, and April 18, 1919, P. L. 72, the appellate court, on appeals from orders on motions to quash or dissolve foreign attachments, will examine the proofs to see if there is any evidence to warrant the findings of the trial court or to sustain the action complained of; but, in making such examination, the prevailing presumption "that everything was done rightly and according to law," still holds.

9. As the Act of 1917 allows an appeal from the refusal to quash a writ, which is an interlocutory order, the usual rule governing such orders applies, and the record must present plainly a clear abuse of discretion, before a reversal can be had.

10. Where a writ of foreign attachment is quashed the record showing such action must be self-sustaining.

11. On an appeal from an order refusing to quash a writ of foreign attachment, a question not raised in the lower court will not be considered.

12. Measure of damages for breach of warranty as to quality of personal property, not decided, because not properly raised.

13. On such appeal, where it appears that defendant claimed the case was *res adjudicata* by a prior suit between the same parties in another court, the appellate court will not pass on this question if it appears the record of the proceedings in the other court was not made part of the record in the case appealed.

14. Not only the pleadings but also the stenographer's notes of the first trial must be given in evidence in the second before the question of *res adjudicata* can be reviewed.

470 PASQUINELLI v. SOUTHERN MACARONI MFG. CO.

Statement of Facts—Arguments. [272 Pa.

Argued October 25, 1921. Appeal, No. 54, Oct. T., 1921, by defendant, from order of C. P. Allegheny Co., Oct. T., 1920, No. 525, discharging rule to quash writ of foreign attachment, in case of G. Pasquinelli, trading as Italian Sausage & Provision Co. v. Southern Macaroni Mfg. Co. Before MOSCHZISKEB, C. J., FRAZER, SIMPSON, KEPHART, SADLER and SCHAFER, JJ. Affirmed.

Rule to quash writ of foreign attachment. Before SHAFER, P. J.

The opinion of the Supreme Court states the facts.

Rule discharged. Defendant appealed.

Error assigned, inter alia, was above order, quoting it.

A. E. Kountz, with him *Geo. L. Schuyler* and *C. A. Fry*, for appellant.—Under the general rule of *res adjudicata* plaintiff was required to set off his claim in the former case, as it would be legally cognizable in the county court proceeding: *Nernst Lamp Co. v. Hill*, 243 Pa. 448; *Raisig v. Graf*, 17 Pa. Superior Ct. 509.

An attempt by this same plaintiff to escape payment of a debt by an action of foreign attachment after verdict against him in the county court was unsuccessful: *Pasquinelli v. Gross*, 74 Pa. Superior Ct. 296.

An inspection of the record shows that nothing alleged by plaintiff is sufficient to overcome the presumption of *res judicata* arising from the county court verdict and judgment.

Ralph H. Frank, with him *J. M. Redden*, for appellee.—The issues here are not *res judicata* because these issues were not required to be raised in the county court, were not raised, and could not have been raised in view of the limitation of the jurisdiction of that court to \$1,500: *Schwan v. Kelly*, 173 Pa. 65; *Jackson v. Thomson*, 215 Pa. 209; *Penna. Laundry Co. v. Land T.*

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& T. Co., 74 Pa. Superior Ct. 329; Reading Co. v. Spink, 263 Pa. 445.

The present action is not barred by the failure of plaintiff herein to raise it as a set-off or counterclaim in the county court.

Even if the present issues were *res judicata*, that is not a question which could be raised by a petition to quash the writ of foreign attachment: *Downing v. Philips*, 4 Yeates 274; *Pasquinelli v. Gross*, 74 Pa. Superior Ct. 296.

OPINION BY MR. CHIEF JUSTICE MOSCHZISKEB, January 3, 1922:

In this case, a motion was made to quash a writ of foreign attachment, on the ground that the indebtedness alleged by plaintiff had been effectually adjudicated against him in a suit between the same parties previously determined by another court of Allegheny County; the motion was overruled and defendant has appealed.

In 1918, defendant sold and delivered to plaintiff 4,865 boxes of macaroni, for \$8,931.75; plaintiff paid \$7,647.85, leaving a balance of \$1,283.90; on April 7, 1919, the present defendant sued the present plaintiff, in the County Court of Allegheny County, to recover the balance due. Defendant's history of the case, on this appeal, states that plaintiff, as defendant in the former action, there filed an affidavit of defense, alleging that, by agreement between the parties, certain of the macaroni had been returned because unmerchantable, and that such return extinguished and satisfied the debt then in suit; but, as is later pointed out in this opinion, the pleadings in the county court have not been properly brought before us, so we cannot go into the details of that defense,—it is enough to say the case resulted in a judgment for the then plaintiff. On July 28, 1920, the present action of foreign attachment in *assumpsit* was instituted against the plaintiff in the judgment in the

county court, and the defendant there, in the capacity of plaintiff here, summoned himself as garnishee, attaching the judgment which he owed the present defendant. Subsequently the plaintiff filed an affidavit of cause of action, claiming \$5,386.90 damages for breach of warranty of the quality of the 4,865 boxes of macaroni; defendant appeared specially and moved to quash the writ of attachment, alleging that plaintiff, when defendant in the county court, might have pleaded his present cause of action as a set-off, therefore the matter was res adjudicata by the judgment against him in that case.

The foregoing statement of facts is taken from defendant's paper-book; plaintiff agrees to it, except that he says, (1) the damages claimed in the case at bar "relate only to 4,171 boxes of macaroni, excluding the 694 boxes which were the subject of the [former] litigation"; and (2), that, owing to the provisions of section 5 of the Act of April 2, 1913, P. L. 21, 28, limiting the jurisdiction of the county court to \$1,500, that tribunal could not have adjudged the instant claim, as a set-off, had he attempted to present it: see, on the last point, *Barker v. Remov*, 69 Pa. Superior Ct. 138, 142, and *Holden v. Wiggins*, 3 P. & W. 469.

We shall not now discuss the points made by plaintiff as to the prior litigation between him and defendant, nor the latter's answering positions, since we deem that course unnecessary to a proper decision of the governing question before us on this appeal, which is, simply: Upon the record brought here, does it appear the court below erred in refusing to quash the writ of foreign attachment?

The question just stated must be disposed of on the record before us without treating any of the matters mentioned in the last two paragraphs as controlling factors, as will be shown during the course of this opinion; but it is necessary to an understanding of the case that we refer to them, and later, when returning to the facts here involved, perhaps to pass on at least one

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phase of plaintiff's second contention above. Before proceeding further, however, we shall state some relevant general principles which must be kept in mind in reaching our final conclusion on the question for determination. The reiteration of these principles in the form in which we shall present them, together with a consideration of certain enlightening authorities, may also prove helpful in straightening out the confusion into which the profession has been led, or has fallen, as indicated by the number of appeals recently before us in litigation of this class.

The plaintiff, in a proceeding of the nature of the case at bar, may attach money in his own hands belonging to the defendant (*Hurt v. Fuller Canneries Co.*, 263 Pa. 238, 240, 243); but, if for any sufficient reason the attachment is shown to be void in law, it will be quashed.

At one time it was held that the power to quash writs was confined to cases where the record disclosed the proceedings to be clearly irregular and void (*Crawford v. Stewart*, 38 Pa. 34, 36; *Steel v. Goodwin*, 113 Pa. 288, 292); subsequently, in certain exceptional instances (which we shall notice later), evidence dehors the record was received to prove grounds for quashing writs. The general rule still is, however, that writs will not be quashed unless some fundamental irregularity appears in the record itself, and cases where this principle has been departed from will be found to present unusual features, which distinguish them from the rule as stated.

There are numerous cases where, on appeal, the courts have reversed orders, quashing writs of foreign attachments or dissolving the attachments, and others where they have sustained refusals to grant such relief; among these the following are instructive: *Pleasants v. Cowden*, 7 W. & S. 379; *Lindsley v. Malone*, 23 Pa. 24; *Crawford v. Stewart*, 38 Pa. 34; *Murdock v. Steiner*, 45 Pa. 349; *Lorenz v. Orlady*, 87 Pa. 226; *Steel v. Goodwin*, 113 Pa. 288; *First Nat. Bk. v. Crosby*, 179 Pa. 63; *Seanor v. Fitt* (No. 2), 263 Pa. 391; *Pottash v. Harten-*

feld Bag Co., 267 Pa. 96; Diamond City, etc., Co. v. Murdock-James Co., 270 Pa. 455; Dempsey v. Petersburg S. & I. Co., 26 Pa. Superior Ct. 633.

Cases where the appellate courts have affirmed the quashing of writs of attachment, so far as they have been called to our attention, or our research has disclosed, are not many; and the instances where such quashing was done on evidence dehors the record are so exceptional that they may be noticed with profit.

In *Downing v. Phillips*, 4 Yeates 274, the defendant produced the record of the court of another state, showing a judgment against him in favor of the plaintiff, involving a prior adjudication of the debt sued for in the attachment proceedings; also disclosing that execution had issued on this foreign judgment and the defendant had, on entering security, been granted an injunction to restrain such execution. Upon these facts, this court, sitting at nisi prius, quashed the writ of attachment, saying that "to entertain suit would be a race for jurisdiction highly unbecoming the relative character of the individual states of the union toward each other"; but, so far as the scanty report of the case makes it known, the real point of controversy between the parties seems to have been a contention by the appellant that the chancellor of the foreign jurisdiction should not have stayed execution, because "no equity appeared in the bill" exhibited there; which matter, this court, of course, declined to pass upon. The right to the summary relief sought,—the quashing of the writ,—was neither questioned nor discussed.

Nicoll v. McCaffrey, 1 Pa. Superior Ct. 187, (opinion by President Judge RICE) is an instance where an effort was made to attach property of a married woman, to satisfy a judgment debt of her husband. In other words, it was a case where an injunction could properly have issued to restrain an execution creditor from selling the property attached (*Hunter's App.*, 40 Pa. 194), and the quashing of the writ would be explainable on that

ground alone; but the case was decided for the reason that, under the law as it then stood,—confining the appellate court to a limited review of the record,—there was nothing before that tribunal to show the court below erred in the exercise of its discretion.

In *Pasquinelli v. Gross*, 74 Pa. Superior Ct. 296, 298, where a rule to “quash or dissolve” an attachment was made absolute, and affirmed on appeal, there was an admission of record by the appellant that his cause of action had already been determined against him in a prior proceeding; and this fact sufficiently explains that case.

In *Brown v. Ridgway*, 10 Pa. 42, there is some confusion as to whether the application was to dissolve the attachment or to quash the writ; however that may be, the order granting the relief prayed for was affirmed simply because, under the limited review then allowed, there was nothing on the record to show an abuse of discretion; this is true also of *Holland v. White*, 120 Pa. 228, and *Shueck v. Freeman*, 55 Pa. Superior Ct. 38, where the applications granted and affirmed were to quash writs.

Probably there are other cases, unmentioned here, where writs were quashed; but we think research will disclose that, wherever this was done on evidence dehors the record, and afterwards affirmed, either the appropriateness of the remedy was not questioned on appeal, or, if that point was considered, the relief granted is explainable on some such exceptional grounds as indicated in the cases above reviewed where the fatal defects did not appear on the face of the record.

The Pennsylvania authorities, down to certain recent cases, to which we shall refer directly, held consistently that the determination of an application either to quash the writ or to dissolve an attachment was not reviewable, because it was a matter within the discretion of the court below, and, since no bill of exceptions lay to bring the evidence relating thereto upon the record, the practical effect of this was that such discretion could not be

reviewed (*Brown v. Ridgway*, 10 Pa. 42; *Lindsley v. Malone*, 23 P. 24; *Holland v. White*, 120 Pa. 228; *First Nat. Bk. v. Crosby*, 179 Pa. 63; *Dempsey v. Petersburg S. & I. Co.*, 26 Pa. Superior Ct. 633); and these principles explain many of the cases decided under the law as it stood prior to the year 1917.

The Act of April 26, 1917, P. L. 102, expressly allows "appeals from orders of court entered on motions to quash or dissolve writs of foreign attachment," and provides that "the evidence on which the case was heard and disposed of in the court below, together with the opinion of the court thereon, shall constitute a part of the record"; further, that the appellate court shall consider the evidence and opinion brought before it and "dispose of the case according as the law and the facts shall be found therefrom": see also the general Act of April 18, 1919, P. L. 72, making the testimony part of the record in all appellate proceedings. Under this legislation, we examine the proofs to see whether there is any evidence to warrant the findings of the trial court, or to sustain the action complained of (*Hand's Case*, 266 Pa. 277, 281); but, in making such examination, the prevailing presumption "that everything was done rightly and according to law" (*Brown v. Ridgway*, 10 Pa. 42, 43) still holds and, since the Act of 1917 allows an appeal (like the one before us) from the refusal to quash a writ, which is an interlocutory order, the usual rule governing appeals from such orders applies, and the record must present plainly a clear abuse of discretion, before a reversal can be had. It is also established that, where a writ is quashed, the record showing such action must be "self-sustaining": *Seanor v. Fitt* (No. 2), 263 Pa. 391, 393.

There is no little confusion among the Pennsylvania authorities as to the distinction between a motion to quash a writ of foreign attachment and one to dissolve the attachment. While President Judge RICE, in *Nicoll v. McCaffrey*, 1 Pa. Superior Ct. 187, 193, points to this

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confusion, he does not attempt to indicate the difference between the two, or to reconcile the various decisions on the subject; which we conclude, after reading a host of them, would be a task both unnecessary and unprofitable to undertake at this time. It is sufficient to say that the broad, or general, distinction is this: Where, notwithstanding the defects pointed out, the suit may remain, as a pending action, a motion to dissolve is correct practice; on the other hand, where the defects depended on are fundamental in character and such as to put plaintiff completely out of court, a motion to quash the writ is proper. To particularize: where security is entered under section 62 of the Act of June 13, 1836, P. L. (1835-36) 572, 583, the motion to dissolve is right, for the statute so ordains; the only other instances where the motion should be interposed are where one who wants relief desires to take advantage of defects in the statement of cause of action, or in the case thereby shown, which are not of such a fundamental nature as to sustain a motion to quash the writ. In *Bergman v. Straus*, 264 Pa. 439, 441-2, we note a distinction between "quashing or refusing to quash a writ of foreign attachment" and the quashing of the attachment itself, calling attention to our recent case of *Mindlin v. Saxony Spinning Co.*, 261 Pa. 354, as an example of the latter class, the motion in that case being to dissolve the attachment. Of course, facts which would support a motion to quash the writ will sustain one to dissolve the attachment, but the reverse is not always true.

An applicant to quash a writ may not aver simply a defense on the merits, or a good legal answer to the alleged debt itself, he must point to some defect in the record which renders the proceeding fundamentally irregular and void (*Crawford v. Stewart*, 38 Pa. 34, 36; *Steel v. Goodwin*, 113 Pa. 288, 292), or if (as in exceptional instances is allowed) evidence dehors the record is produced to establish defects therein, the defects depended on must be of a character to put plaintiff

completely out of court, such as that the writ was issued in practical contempt of a previously issued decree of a chancery court forbidding such proceedings (*Downing v. Philips*, 4 Yeates 274), or that it issued in a case where an injunction, if asked for, would undoubtedly have gone out against the attachment (*Nicoll v. McCaffrey*, 1 Pa. Superior Ct. 187), or that one of the statutory props required to sustain the attachment is missing,—for example, that the person owning the property attached is a resident of the State and was within the county where the writ issued at the time of its issuance; or, again, that the property in question is, by statute, exempt from attachment; or that, for some other such reason, foreign attachment does not lie. If the most that is averred is a defense on the merits, or simply a good legal answer to the alleged debt itself, such a defense must be developed at trial, unless an agreement on the facts, or something tantamount thereto, appears, which shows a case so fully developed that, if on trial, it would require binding instructions for defendant: *Pasquinelli v. Gross*, 74 Pa. Superior Ct. 296.

To return to the facts in hand, plaintiff's affidavit of cause of action,—after averring the macaroni in controversy, instead of being up to the alleged warranty of quality, had proved "worthless for human consumption as food," and that he had therefore been "compelled to, and did, dispose of said merchandise as feed for chickens," realizing \$2,260.95,—states that he arrived at his loss, which constitutes the present claim, by deducting the amount received by him from \$7,647.85, the sum he had previously paid defendant.

The measure of damage for breach of warranty as to quality of personal property, is well established; the purchaser is entitled to the difference between the value of the goods as warranted and their value in the condition complained of (*Sedgwick on Damages*, 290, and Pennsylvania cases cited in *Reynolds v. Ramsey*, 56 Pa. Superior Ct. 97, 100), the value contemplated being

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"market value" (*Himes v. Kiehl*, 154 Pa. 190, 196), and, as to this, the price paid or agreed to be paid the seller, in the absence of better evidence, is *prima facie* proof of the market value of the articles in the condition warranted, at least so far as the seller is concerned; that is, if the purchaser sees fit to adopt such proof: *Reynolds v. Ramsey*, *supra*. When the merchandise in question is expressly, or in effect, alleged to be unsalable on the open market (as in the present case), the price at which it was disposed of may, or may not, according to the attending circumstances, be evidence of the obtainable value of the articles in their actual condition: *Reynolds v. Ramsey*, *supra*, and *Freyman v. Knecht*, 78 Pa. 141, 144.

In view of the guiding principles already stated, we cannot hold,—as defendant contends,—it is evident from plaintiff's affidavit of cause of action that, in fixing his damages at more than \$1,500, he adopted a wrong and purely arbitrary measure, and therefore had not shown his claim to be beyond the jurisdiction of the county court; but, even if it did appear that plaintiff had a wrong measure of damages in mind, that contention is put forth for the first time on this appeal, so far as the record before us indicates. Defendant's petition to quash the writ of attachment makes no mention of the amounts claimed by plaintiff; had it done so, and were plaintiff's measure of damages wrong, the court below might have allowed an amendment (*Hurt v. Fuller Canneries Co.*, 263 Pa. 238, 241, 242), and the record might have come before us in different form. This calls for application of the rule that, points "not raised in the lower court will not be considered on appeal" (*Hurt v. Fuller*, 263 Pa. 238, 241), and, heeding that rule, we cannot pass on the contention under discussion.

While each of the various rules hereinbefore noted has its place in the case, those that really govern our decision, in the last analysis, are these: (1) Where a court quashes a writ, it is required that the record,

showing such action, shall be "self-sustaining"; and (2) although an appeal is allowed from the refusal to quash a writ, yet such refusal is but an interlocutory order, and hence, to justify a reversal, the record must clearly show a plain abuse of discretion. When these two rules (which are among those reviewed earlier in the present opinion) are kept in mind, it becomes manifest this court cannot hold that the writ of attachment now before us should have been quashed; for here the record fails to show the facts essential to a proper determination of the plea of *res adjudicata*, depended on by appellant as the sole warrant for the relief asked, or to make it plain those facts were presented to the court below in such form—either as established, admitted, or uncontroverted,—that their legal effect could be passed on, so far as the plea in question is concerned. In this connection, although plaintiff's affidavit of cause of action in the present suit refers to the record of the county court, it is neither attached thereto nor otherwise exhibited; and, so far as we have any light on the subject, such record may never have been actually produced in the court below for official examination. We may add that, while the pleadings in the county court are printed by appellant, yet, never having been formally brought upon the record of the common pleas, they are not properly here; moreover, the evidence in the county court is not even printed on this appeal, and there is no suggestion that it was before the court below.

Of course, in passing on a plea of *res adjudicata*, "re-course must be had to the pleadings" in the respective actions (*Jackson v. Thompson*, 215 Pa. 209, 212), to see if the issues in the one are the same as in the other, and to decide as to their comprehensiveness, the judgment in the first action being inconclusive of matters neither up for determination in that case (*Jackson v. Thompson*, *supra*, 214) nor material to issues necessarily involved in, or inseparable from, those then before the court (*Reading Co. v. Spink*, 263 Pa. 445), even though

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such matters "may have been injected into the trial": *Jackson v. Thompson*, *supra*, 214; *Schwan v. Kelly*, 173 Pa. 65, 72; *Pa. Laundry Co. v. Land T. & T. Co.*, 74 Pa. Superior Ct. 329, 337. In short, till something is shown to the contrary, the pleadings are assumed to fix the issues; but, in these practical days, issues which have never been properly pleaded, are often, by mutual consent, tacitly allowed as controlling in the trial of cases, the pleadings, after verdict, being treated as amended (*Fisher v. Fidelity M. L. Co.*, 188 Pa. 1, 11; *Pittsburgh Co. v. Dravo Co.*, 272 Pa. 118); therefore, when the pleadings in the first case have not been properly brought upon the record of the second, and the stenographer's notes of the first trial have not been produced in the second (which is true here), it can hardly be said, as a matter of law, that the court below erred in refusing to sustain a plea of *res adjudicata*.

The case before us certainly requires a view of the entire record of the county court, to determine whether or not the matters comprehended by plaintiff's present claims were in any way adjudicated or affected by the proceedings in that tribunal; for all we know, there may have been admissions, or something tantamount to admissions, on that record, which controlled the verdict and judgment there entered. The defendant in that case (plaintiff here) may have admitted that the defense there set up (which he now asserts as absolutely independent of his present claim for damages) was the only one he had against the indebtedness then in suit; or the full record of that case may show that the defendant there (plaintiff here) treated facts which enter into his present claim in such a way as to constitute a severance of what he here calls an entire amount, and asserts to be, in law, nonseverable, and that parts of such claim were in fact severed and passed upon. (For a discussion of severable and nonseverable claims, see *Carvill v. Garrigues*, 5 Pa. 152, 153; also *Holden v. Wiggins*, 3 P. & W. 469, 474.) Of course, we cannot assume any

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of these conditions did in fact exist; but what the true situation may have been as to such matters, and others affecting plaintiff's present claims, the record before us fails to show. It is clear, however, that this is not an instance where the court below, on the information furnished it, could have sustained defendant's plea of *res adjudicata*, for the purpose of quashing the writ of attachment; whether or not that plea will constitute a good legal answer to all or any part of plaintiff's claim, will have to be decided, if properly raised, at the trial of the case, which is the usual time for determining such matters. What we now decide, as controlling, is that the court below did not err in refusing to quash the writ of attachment, for this record does not present a case for that summary form of relief.

The assignments of error, which go to the points determined, are overruled; the others are dismissed as immaterial.

The order appealed from is affirmed.

Balogh v. Jackson, Appellant.

Attorneys-at-law—Retention of client's money—Breach of fidelity to client—Disbarment—Trial by jury—Acts of April 14, 1834, P. L. 354, and June 16, 1836, P. L. 793.

1. In a disbarment proceeding, an attorney is not entitled to a trial by jury.

2. Where an attorney-at-law receives from a client a large sum of money under the allegation that it was necessary to secure bail, and subsequently acquiesces in the quashing of a writ of habeas corpus, without consulting his client and without his knowledge, and there is no evidence of the commission of any crime by the client, it is proper for the court, under the Act of April 14, 1834, P. L. 354, summarily to disbar the attorney without the allowance of a jury trial; and this is the case although the attorney claims that he retained the money as a fee.

3. In such case there would be nothing for a jury to pass upon; for, whatever fee the attorney might have been entitled to claim,

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if he had acted according to proper standards of professional honor, was forfeited by his fraudulent conduct and lack of fidelity to his client.

Argued October 25, 1921. Appeals, Nos. 117 and 118, Oct. T., 1921, by defendant, from order of C. P. Allegheny Co., Jan. T., 1920, Nos. 1212 and 2258, making absolute rule to disbar, in case of Thomas Balogh v. Richard H. Jackson. Before MOSCHZISKE, C. J., FRAZER, SIMPSON, KEPHART, SADLER and SCHAFER, JJ. Affirmed.

Rule to pay over money to client.

Rule to disbar. Before SWEARINGEN, J.

The opinion of the Supreme Court states the facts.

Rules absolute. Defendant appealed.

Errors assigned were, inter alia, above orders, quoting them.

S. S. Robertson, for appellant.

Ralph J. Brown, with him Joseph F. Mayhugh, for appellee.

OPINION BY MR. JUSTICE SCHAFER, January 3, 1922:

We have approached the consideration of these appeals with a full realization of the consequences to appellant of our action on them. He has long been a member of the Allegheny County Bar, and has occupied a position of prominence in the community to which it ministers, having been for several years district attorney of that important and populous county. The order of the court below is one of disbarment, striking his name from the roll of attorneys practicing before it.

Appellant challenges the order complained of in but one respect; he contends that he is entitled to a trial by jury.

There are two appeals here from two proceedings in the court below; one under the Act of June 16, 1836, P. L. 793, Stewart's Purdon, vol. 1, p. 375, for an order requiring the respondent to turn over money in his hands belonging to a client, the petitioner, and the other, under the Act of April 14, 1834, P. L. 354, Stewart's Purdon, vol. 1, p. 374, for disbarment. Both proceedings were decided against appellant, and the latter, to some extent at least, depends upon the former, for if the former falls, so may the order of disbarment. The controlling question now before us is, Did the court, in summarily disposing of the first-mentioned petition, proceed properly, or was the respondent entitled to a trial by jury?

Thomas Balogh, the petitioner, was arrested on a warrant charging him with being a fugitive from justice in the State of New York; the crime, lying back of this charge, was murder. He was incarcerated in the Westmoreland County jail, where appellant, summoned by the prisoner's wife, visited him professionally. While there, he obtained from the accused cash and checks on banks at Gary, Indiana, aggregating more than \$4,000. The court below found as a fact that this money was received by appellant, for the purpose of pledging it as security to whosoever should become petitioner's bail, and that appellant did not attempt to secure bail for him. It further found that, on the hearing of the writ of habeas corpus granted by the Westmoreland County court, for the release of the accused from custody, appellant consented that the writ be quashed and the petitioner remanded to jail, without the consent or knowledge of the accused and with no evidence produced against him. He was subsequently released from custody, not by reason of any act or effort on the part of appellant, but because the authorities in New York advised they had no charge to press against the prisoner. The court also found that appellant had converted his client's money to his own use, and that demand had been made for the return of it. Appellant contended that

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the money in question was received by him as fees for professional services; but the court, in the light of the circumstances, upon ample testimony, properly held this contention could not be sustained. Even if the facts were otherwise, the gross breach of fidelity to his client, in acquiescing in the quashing of the writ of habeas corpus, without consulting him and without his knowledge, when there was no evidence of the commission of any crime, stands without any satisfying explanation by appellant.

In the Act of April 14, 1834, it is provided: "If any [attorney] shall retain money belonging to his client, after demand by the client for payment thereof, it shall be the duty of the court to cause the name of such attorney to be stricken from the record of the attorneys, and to prevent him from prosecuting longer in the said court." By the Act of June 16, 1836, it is enacted: "The several courts aforesaid shall have power . . . to make rules upon attorneys for the payment of money, and the delivery of deeds, and other papers in their hands, belonging to their clients, and in every such case to enforce obedience to such rules by attachment." These acts of assembly have received our construction, and the power of the courts acting under them has been clearly defined.

While *Balsbaugh v. Frazer*, 19 Pa. 95, was not a proceeding by rule, but an action of assumpsit to recover moneys collected by the defendant as an attorney-at-law, the rights and duties which spring from the relation of attorney and client were there laid down by Chief Justice BLACK, speaking for this court. Referring to the question which now concerns us, he said, "if the client is dissatisfied with the sum retained [for fees], he may either bring suit against the attorney, or take a rule upon him. In the latter case the court will compel immediate justice, or inflict summary punishment on the attorney, if the sum retained be such as to show a fraudulent intent. But if the answer to the rule con-

vinces the court that it was held back in good faith, and believed not to be more than an honest compensation, the rule will be dismissed, and the client remitted to a jury trial. But if he has not acted in good faith; if he has attempted to defraud his client,.....he forfeits all claim to any compensation whatever."

In Martin's Petition, 237 Pa. 159, we took occasion to say, the "relation [of attorney and client] is so confidential in its nature that it calls for the exercise of the most perfect good faith. In transaction between counsel and client, no shadow of anything like deception or unfair dealing, upon the part of an attorney, can be countenanced. In every case in which complaint is made, the courts will scrutinize the transaction with jealous care to see that there is no relaxation of the rule.....Anything which savors of lack of good faith upon the part of an attorney such as.....the refusal or neglect to pay over promptly upon demand, calls for forfeiture of all claim to compensation." In that case, by order made in this court, counsel were deprived of all compensation because of their dereliction in duty.

In Kennedy's Case, 120 Pa. 497, after quoting from *Balsbaugh v. Frazer*, it is said, "A man does not lose his right to trial by jury because he is an attorney-at-law. Where an issue of fact is fairly raised between himself and his client he is as much entitled to such trial as any other citizen." In thus expressing itself, the court was speaking of cases where the answer made to the rule convinces the court that the money was held back in good faith.

In no case, brought to our attention, has it been held that an attorney, accused of withholding money belonging to a client, is entitled to a jury trial, save where there was an honest dispute between lawyer and client as to the amount due the latter for fees. In this class of cases, there is a preliminary inquiry by the court,—just as there would be on the request for an issue *devisavit vel non* and certain other issues,—as to whether the dis-

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pute is in good faith and meritorious, and, only if found to be such, is the issue remitted to a jury to determine the amount due; if, however, the court reaches the conclusion, on the preliminary inquiry, that there was bad faith, overreaching, fraud or dishonesty on the attorney's part, it proceeds summarily to dispose of the matter by order.

"The power of a court to disbar an attorney should be exercised with great caution, but there should be no hesitation in exercising it, when it clearly appears that it is demanded for the protection of the public. The court, by admitting an attorney to practice, endorses him to the public as worthy of confidence in his professional relations, and if he becomes unworthy, it is its duty to withdraw its endorsement. It is unimportant, as affecting the right and duty of the court in disbarment proceedings, where the misconduct of the attorney occurs. Aside from the general power of the court in the matter, section 74 of the Act of April 14, 1834, P. L. 333, makes it the duty of the court to strike from the roll of attorneys any one who shall retain money belonging to a client after demand": *In re Graffius*, 241 Pa. 222.

Mr. Justice DEAN, in his forceful way, thus vindicated the power of the court to deal with the derelictions of attorneys at its bar, in *Smith's App.*, 179 Pa. 14: "In such case, to successfully deny the jurisdiction of the court in summary proceedings for disbarment of a guilty officer, would practically strip it of the power of judicial self-defense, and make the bar, instead of an honorable and learned profession, a sort of fortress for the unprincipled, from which they would prey with impunity upon the public without, and attack the court from within. From the very nature of his office, and its relation to the public and the court, a lawyer, who enters at his own solicitation by the front door, subjects himself to ejection by the back one, if he does not 'behave himself well.' Nor is there any more reason for calling in a jury to pass upon his misconduct when he is put without the

bar, than for calling in one to pass upon his professional qualifications when he is admitted within it. The subject of investigation and judgment in both cases is one for which the court, and the court alone, is well qualified, while the jury is not."

What was said in *Murphy's Est.*, 258 Pa. 38, in no way lessens the dominion of the court over members of the bar who are unworthy to be such. That part of the opinion relied on by appellant, wherein it is stated, "If there be a dispute as to the terms of an agreement as to the fees to be paid, the question becomes one of fact, and a man does not lose his right to a trial by jury because he is an attorney-at-law," must be read in connection with this language, used therein: "If from the pleadings it has appeared to the court below that the appellee had misbehaved himself in his office as an attorney practicing before it, or that the money which he retained was under its jurisdiction, it clearly could have punished the offending practitioner or required him to turn over the money in his hands to the estate to which they belonged."

In the instant case, there would be nothing for a jury to pass upon; for, whatever fees appellant might have been entitled to claim, had he acted according to proper standards of professional honor, he has forfeited by his fraudulent conduct and lack of fidelity to his client: *Balsbaugh v. Frazer*, 19 Pa. 95; *Shoemaker v. Stiles*, 102 Pa. 549; *Martins's Petition*, 237 Pa. 159. Appellant, having extracted from his client a large sum, under the allegation that it was necessary to be used in the procurement of bail, and having betrayed him in the habeas corpus proceedings, has forfeited any claim to compensation which he might otherwise have set up. If he was before a jury, answering a demand for the money he had received, and, in counterclaim, set up an indebtedness for fees, the court would be bound to rule, as matter of law, that such claim, under the circum-

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stances of bad faith here appearing, could not be allowed.

The appeals from both proceedings are dismissed at appellant's cost.

Onorato v. Carlini et al.

Equity—Equity jurisdiction—Remedy at law—Equity practice—Cloud on title—Demurring and answering at same time—Words and phrases—Sheriff's inquisition—Satisfaction of debt in seven years—Invalid sheriff's sale—Ejectment bill.

1. A cloud on title is a title or encumbrance apparently valid, but in fact invalid.

2. Equity has jurisdiction to remove clouds on titles, and, in a proper case, it will direct the instrument casting the cloud on the title to be delivered up and cancelled.

3. A defendant may not answer and demur to the whole bill.

4. An objection to the jurisdiction of a court of equity must be taken, either by demurrer or plea, before answer. By demurring and answering, defendant waives the question of jurisdiction.

5. Where in a proceeding in equity, plaintiff's title is clear and all the evidence relating to it is of such a character that a judge in a trial at law, upon the same evidence, would not be at liberty to submit the question to the jury, equity will grant relief.

6. Equity has jurisdiction of a bill in equity for a reconveyance of real estate, and cancellation of a mortgage thereon, where it appears that, under a judgment against plaintiff, a sheriff's inquisition found that the rents, issues and profits of the premises, were of a yearly value to satisfy the debt, interest and costs, in seven years, and that, notwithstanding the return, the property was sold and conveyed by the sheriff to one of the defendants, who conveyed to another of the defendants, the latter giving a mortgage for part of the purchase money.

7. In such case the sheriff's deed, and the subsequent deed and mortgage, were mere nullities and clouds on the title, and equity had jurisdiction to remove them.

8. The bill, in such case, was not an ejectment bill. If plaintiff had brought his action at law, the mortgagee, in the mortgage given by defendant, would not have been bound by the judgment, and therefore plaintiff's remedy on the law side of the court would not be complete and adequate.

Statement of Facts—Opinion of the Court. [272 Pa.

Argued October 25, 1921. Appeal, No. 180, Oct. T., 1921, by Antonio Mannino, a defendant, from decree of C. P. Allegheny Co., Oct. T., 1919, No. 899, for plaintiff, on bill in equity, in case of Antonio Onorato v. Guglielmo Carlini et al. Before MOSCHZISKER, C. J., FRAZER, SIMPSON, KEPHART, SADLER and SCHAFER, JJ. Affirmed.

Bill for reconveyance of real estate, and for cancellation of mortgage thereon. Before CARPENTER, J.

The opinion of the Supreme Court states the facts.

Decree for plaintiff. Antonio Mannino, a defendant, appealed.

Error assigned, among others, was decree, quoting it.

Ralph C. Davis, for appellant.—The court below should have dismissed plaintiff's bill as an ejectment bill: *Leininger v. R. R.*, 180 Pa. 287; *North Shore R. R. v. R. R.*, 193 Pa. 631; *Saunders v. Racquet Club*, 170 Pa. 265; *Long's App.*, 92 Pa. 171.

A. O. Fording, for appellee.—Whether the court has jurisdiction should be determined, not by the decree, but by the face of the bill: *Adams's App.*, 113 Pa. 449.

Objection to the jurisdiction should have been made by demurrer. It was not made until the trial was near its end: *Sunbury & E. R. R. v. Cooper*, 33 Pa. 278; *Adams's App.*, 113 Pa. 449.

OPINION BY MR. JUSTICE SCHAFER, January 3, 1922:

Plaintiff, Antonio Onorato, is the owner of the property out of which this proceeding arises; appellant, Antonio Mannino, was his tenant. Guglielmo Carlini—who, with Mannino, Stephen H. Huselton and Clara A. Rodgers, were named as defendants in the bill—brought an action of ejectment against Onorato for part of the property, which resulted in a judgment by default

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against that defendant, for the land described in the writ and 6¼ cents damages. Huselton was Carlini's attorney, and Clara A. Rodgers was the former's sister-in-law. The bill charges a conspiracy by the defendants to defraud plaintiff of his property through the medium of a sheriff's sale; while the court held this charge not established, it sustained the bill on other grounds, and awarded the relief prayed for. The defendant Mannino alone appeals.

The record discloses facts somewhat out of the ordinary. Carlini having procured the judgment for 6¼ cents damages against Onorato, who resided in Ohio, paid the costs amounting to \$12.60, and, through his attorney, Huselton, issued a fieri facias on the judgment, for the collection of the damages and costs. On the appearance docket in the ejectment proceedings, the following entry was made: "A. Bertollett, Jr., Bill, \$1545." This was also endorsed on the fieri facias. The court found this was a fictitious claim, entered or procured to be entered, by Huselton.

The sheriff, in pursuance of the writ, levied on the property of Onorato, and, on the condemnation, the sheriff's jury made return that the rents, issues and profits of the premises, were of a clear yearly value sufficient to satisfy the debt, interest and costs in seven years; which return was in conformity with the facts, as the property was renting for thirty-three dollars a month. Notwithstanding this return, a venditioni exponas was issued and the property sold, the purchaser being Huselton, and the sheriff's deed was made by his direction to Clara A. Rodgers, who conveyed to Mannino for a consideration of \$4,000, \$700 of which was paid in cash and \$3,300 was represented by Mannino's purchase-money mortgage. Onorato had no actual knowledge of any of the proceedings; as before stated, Mannino was his tenant and occupying the property.

To the court's findings that Mannino was not a bona fide purchaser, and was guilty of what amounts to fraud,

error is not assigned. The only question raised for our determination is, whether equity has jurisdiction, the argument being that the bill is an ejectment bill.

Although the court below does not specifically find that Mannino practiced a fraud on his landlord, Onorato, in acquiring the property, we think such a specific finding might have been made; certain it is, Mannino must have had knowledge of the sheriff's sale, yet he did not inform Onorato of what was going on, and took the deed for the property without disclosing his purchase. No title passed by the sheriff's deed to Clara A. Rodgers. The Act of June 16, 1836, P. L. 772, 2 Stewart's Purdon 1567, provides: "If the inquest shall find that the clear profits of any real estate levied as aforesaid will not be sufficient to satisfy within seven years, the debt or damages in such execution, and the same shall be approved of by the court, the plaintiff in such writ may have a writ of venditioni exponas to sell such real estate for and towards the satisfaction of his judgment." The inquest having found that the rents, issues and profits were of a value, sufficient within seven years to satisfy the debt, interest and costs, no writ of venditioni exponas could be issued. Its issuance, after this return, was unlawful, and nothing could be sold by it. The deed of the sheriff in pursuance of it was a nullity, the only effect of which was to put a cloud on plaintiff's title. "A cloud on title is a title or encumbrance apparently valid but in fact invalid." *Octoraro Water Co. v. Garrison*, 271 Pa. 421.

As the only question raised by the record is that of equitable jurisdiction, its resolution must be in appellee's favor. "Equity has jurisdiction to remove clouds from title, and, in a proper case, it will direct the instrument casting the cloud on the title to be delivered up and cancelled." *Octoraro Water Co. v. Garrison*, *supra*. Whilst it is true, plaintiff does not denominate his bill one to remove a cloud on title, yet, that is its purpose and effect, and that is the result of the relief

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prayed for and granted. In no sense was it an ejectment bill; appellant acquired no title whatever by his deed; not only was the deed from the sheriff a cloud on plaintiff's title, but so was the deed to appellant and the mortgage made by him, because the grantor in the one and the mortgagor in the other had no title to convey or pledge.

Furthermore, the record discloses that, while by demurrer appellant attempted to raise the question of the legality of the remedy sought by plaintiff, yet, at the same time, he also answered the bill. A defendant may not answer and demur to the whole bill: *Stegmaier v. Keystone Coal Co.*, 232 Pa. 140. An objection to the jurisdiction of a court of equity, must be taken, either by demurrer or plea, before answer: *Margarge v. Ziegler*, 9 Pa. Superior Ct. 438; *People's National Bank v. Loeffert*, 184 Pa. 164. By demurring and answering, defendant waived the question of jurisdiction.

Had an action of ejectment been brought at law, what would have been the necessary outcome? Under the facts as established, the court would have been required to give binding instructions for plaintiff. Where, in a proceeding in equity, plaintiff's title is clear and all the evidence relating to it is of such a character that a judge in a trial at law, upon the same evidence, would not be at liberty to submit the question to the jury, equity will grant relief: *Richmond v. Bennett*, 205 Pa. 470; *Wilson v. Cather*, 214 Pa. 3, 7. In addition to this, had plaintiff brought his action at law, the mortgagee in the mortgage given by defendant, would not have been bound by the judgment, and therefore plaintiff's remedy on the law side of the court would not be complete and adequate. We entertain no doubt as to the jurisdiction in equity.

The decree is affirmed at appellant's cost.

Gairt v. Curry Coal Mining Co. et al., Appellants.

Workmen's compensation—Modification of order—Reinstatement of original compensation order.

1. Where, following a compensation agreement based on total disability, an order is made terminating such agreement but directing further compensation to be paid as partial disability, "same to be determined after complainant has returned to work and his loss of earning power has been established," the workmen's compensation board has jurisdiction at any time during the period of 500 weeks to reinstate the original compensation agreement for total disability if such disability is established.

2. In such case, it is immaterial that after claimant had returned to work the board had refused the petitions filed by him for review and modification, before the final one was filed on which reinstatement was made.

3. A proceeding under the Workmen's Compensation Act is not "litigation" to which established rules and principles of common law practice are applicable.

4. Those appointed to administer the Compensation Act are vested with authority to act for the State in the capacity of *parens patriæ*.

Argued October 26, 1921. Appeal, No. 49, Oct. T., 1921, by defendants, from order of C. P. Cambria Co., Sept. T., 1920, No. 411, affirming decision of the Workmen's Compensation Board, in case of Joe Gairt v. Curry Coal Mining Co. and *Ætna Life Ins. Co.*, insurance carrier. Before MOSCHZISKE, C. J., FRAZER, SIMPSON, KEPHART, SADLER and SCHAFER, JJ. Affirmed.

Appeal from Workmen's Compensation Board. Before EVANS, J.

The opinion of the Supreme Court states the facts. Decision affirmed. Defendants appealed.

Error assigned, inter alia, was order, quoting it.

William A. Challener, with him *Clarence Burleigh* and *F. J. Hartmann*, for appellants.

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Chas. J. Margiotti, with him *McCann & McCann* and *James W. Leech*, for appellee.

OPINION BY MR. CHIEF JUSTICE MOSCHZISKEB, January 3, 1922:

Joe Gairt, claimant and appellee, on October 10, 1919, presented a petition to the Workmen's Compensation Board to reinstate a compensation agreement, which had been entered into May 4, 1917, between him, the Curry Coal Mining Company, defendant, and the *Ætna* Life Insurance Company, insurance carrier (intervenor), for injuries which Gairt had sustained, on March 10, 1917, while in the course of his employment as a coal miner for defendant.

On July 29, 1918, the compensation authorities made an order that the agreement of May 4, 1917, should "terminate," for "total disability," as of July 9, 1918, and that further compensation, "to be determined after claimant has returned to work and his loss of earning power has been established," should be paid for "partial disability." Payments ceased as of July 9, 1918. Between December 2, 1918, and March 24, 1919, three separate petitions were presented by Gairt, asking for review and modifications, all of which were refused. On August 24, 1920, the board, acting on the petition of October 10, 1919, first above mentioned, found that claimant was totally and permanently disabled; and it made an order reinstating the compensation agreement as of July 9, 1918. This was affirmed by the common pleas; and thereupon defendant and the insurance carrier appealed.

Appellants contend that the compensation authorities were without jurisdiction to make the order now before us, because claimant's right to receive compensation covering the period since July 9, 1918, was finally adjudicated against him by the refusal of the three prior petitions, and the board's power to act in that regard was exhausted. As to this, the court below held that the

original order, stopping payments to claimant, "clearly left open," to be fixed at a subsequent date, "the payments to be made on account of the injury, the amount of these payments to be determined on a later investigation"; adding: "The last investigation satisfied the board, on the question of fact, that the claimant had never been able to resume [his normal] work.....and it made, inter alia, the following findings of fact, amply supported by testimony: 'These injuries are permanent, and have rendered him unfit for the occupation in which he was engaged at the time of the injury, namely, that of a miner.....Claimant made a real effort to work, but was unable to do so, frequently being compelled to move about on his hands and knees because of the pain and inconvenience suffered in his efforts to comply with the referee's order.....[He] has demonstrated in his efforts, as well as by the medical testimony taken in these proceedings, that he is totally and permanently disabled.' [Again it may be said], the questions as to the extent of the injury, and the extent of its interference with the ability of the claimant to labor, were clearly left open by the order and decree of July 29, 1918, and the investigation subsequently made satisfied the board that the injury resulted in total disability.....The referee, in the first instance, very properly undertook to relieve the defendant from the obligation to pay until the exact status of the claimant could be determined, [and].....the testimony in the proceedings [for review and modification] did not develop what the present testimony clearly reveals."

We quite agree with the conclusion reached by the compensation board and affirmed by the learned court below; and, since the chairman of the former, in his opinion filed in this case, so correctly states the law, we quote therefrom as follows: "The act gives to the board jurisdiction over an agreement [for purposes of review] at any time during the life of the agreement, or during the period of time [it has] to run. A disability agree-

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ment contemplates a total payment of compensation to the claimant for a period of 500 weeks. If, for any good cause....., by action of the board, the employer is relieved of payment of compensation, at any time during that period, such action is entirely to the benefit of the employer, and he cannot complain if, subsequently, during the 500 weeks, a changed status of the claimant revives the employer's liability to pay compensation. When the referee made his order [stopping payments], the use of the word 'terminate' was unfortunate, as it [likewise] was, in the original act. It was beyond the power of the referee to find that total disability had so absolutely ceased that there could be no further liability on the part of the employer to pay the injured man on that basis. All the referee could [properly] find, as a fact, under the medical testimony at the time, was that the malignant features of total disability had disappeared; he could not find, nor could any human being know, that, at some time in the future, within the running of the agreement as contemplated by the law, there would not be a recurrence of total disability (as there has been in this case). When a workman is injured and a compensation agreement is entered into, it is within the minds of the parties, or at least the law imputes the intention to the parties, that such agreement may run 500 weeks, if the injury develops total disability for that length of time; so that, when the board, either of itself, or by one of its referees, relieves the employer of such payment, it merely suspends that payment or that obligation, waiting further developments of injuries. The legislature recognized this fact when it included in the amended law (see section 413, Act of June 2, 1919, P. L. 642, 661) the word 'suspend.' Many times previous to that amendment the board had made suspensory orders to relieve an employer from present payment, but preserving at the same time the right of payment to the injured man, should there be a recurrence of disability."

As said in the matter quoted above, the first order, stopping payments, merely suspended the obligation to pay, and during the period indicated, it was within the power of the compensation authorities to revise their order, to accord with the requirements of the case as the facts might demand.

The fundamental error of appellants lies in their idea that a proceeding under the Workmen's Compensation Law is "litigation," and that established rules and principles of common law practice should be applied there-to; whereas the fact is quite the contrary.

Although the arrangement inaugurated by the Act of June 2, 1915, P. L. 735, to pay standardized compensation in cases of injury or death, rests on the theory of contract between employer and employee (*Anderson v. Carnegie Steel Co.*, 255 Pa. 33, 39, 40), yet, in administering this plan, those vested with authority act for the State, in its capacity of *parens patriæ*, and the relevant legislation clearly contemplates that, after a compensation agreement has been filed, or an order for compensation made, persons affected may apply for review and modification during the time the agreement or order has to run: Article IV, section 423, Act of 1915; article IV, section 408, and particularly article IV, section 413, Act of 1919; *Hughes v. American Int. S. S. Corp.*, 270 Pa. 27, 30; also see *Kuca v. Lehigh V. C. Co.*, 268 Pa. 163, 166, holding that procedural parts of the Act of 1919 apply to pending cases. Under this benevolent piece of legislation, one in the position of the present claimant may, from time to time, come to those in authority saying, "Since you stopped payments to me, facts have developed which show my need of, and right to, compensation; I pray you to look into these facts and determine what, if anything, I am now entitled to receive"; and that, in substance, is what the present claimant did.

We need refer to but one remaining point suggested by appellant: While the board makes reference to the fact that it had not been demonstrated whether or not

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claimant had capacity to do work other than as a miner, since no different position had been given him by defendant, yet, as shown by the quotations hereinbefore recited from the opinions of the board and court below, the conclusions of neither of those tribunals depend on the circumstance that defendant had failed to place claimant at different work, but upon other facts which prove him to be totally and permanently disabled.

The assignments of error are overruled and the judgment is affirmed.

Craft, Appellant, v. Hines, Director General.

Negligence—Railroads—Speed—Signals—Warnings—Negative evidence of plaintiff—Positive evidence of defendant—Case for court.

1. Railroads operating their trains in the open country may move them at such rate of speed as the character of their machinery and roadbed may make practicable.

2. In operating trains in the open country, it is not the rate of speed at crossings that is the negligence of the company but the failure to give proper notice of the approach of the train.

3. In an action for death of a passenger on an automobile truck in a collision with a train at a crossing in the open country, the evidence of defendant's failure to give proper signals and warnings is insufficient to submit to the jury, where the testimony of the witnesses for plaintiff was all negative in character, being, in effect, that they did not hear any signals without showing that they were watchful or attentive for a signal, while numerous witnesses, both employees of defendants and others, testified positively that they heard the whistle blow and the bell ring.

Argued October 26, 1921. Appeal, No. 102, Oct. T., 1921, by plaintiff, from judgment of C. P. Jefferson Co., Aug. T., 1919, No. 272, on verdict for defendant, in case of Lillie Craft v. Walker D. Hines, Director General of the United States Railroad Administration, operating the Buffalo, Rochester & Pittsburgh Railway Co. Before MOSCHZISKER, C. J., FRAZER, SIMPSON, KEPHART, SADLER and SCHAFER, JJ. Affirmed.

500 CRAFT, Appellant, v. HINES, DIR. GENERAL.

Assignment of Error—Opinion of the Court. [272 Pa. Trespass for death of plaintiff's husband. Before CORBETT, P. J.]

The opinion of the Supreme Court states the facts.

Directed verdict and judgment for defendant. Plaintiff appealed.

Error assigned was direction of verdict for defendant, quoting record.

Charles J. Margiotti, with him *Gillespie & Gillespie*, for appellant.—Defendant's negligence was for the jury: *Howett v. R. R.*, 166 Pa. 607; *Walbridge v. R. R.*, 190 Pa. 274; *Greenfield v. Ry.*, 178 Pa. 194; *Bickel v. R. R.*, 217 Pa. 456; *Wanner v. R. R.*, 261 Pa. 273.

W. C. Miller, with him *John G. Whitmore, C. Z. Gordon* and *H. B. Hartswick*, for appellee.—Plaintiff offered no testimony to take this case to the jury as to whether or not warning of the approach of the train was given by whistle and bell. Its testimony was purely negative, and as against the positive testimony of defendant amounted to nothing: *Moses v. Ry.*, 258 Pa. 537; *Childs v. R. R.*, 150 Pa. 73; *Schwartz v. R. R.*, 218 Pa. 187, 196; *Jerdon v. P. Transit Co.*, 260 Pa. 275; *Anspach v. Ry.*, 225 Pa. 528; *Charles v. R. R.*, 245 Pa. 496; *Leader v. Ry.* 246 Pa. 452; *Wind v. Steiert & Son*, 71 Pa. Superior Ct. 194; *Dryden v. R. R.*, 211 Pa. 620.

OPINION BY MR. JUSTICE SCHAFFER, January 3, 1922:

This is an action to recover damages for death at a grade crossing. The trial court gave binding instructions for defendant; plaintiff appeals.

About six o'clock in the afternoon of July 4, 1918, the day being clear, plaintiff's husband, who was a passenger for hire in an automobile truck, was killed in a collision between it and a locomotive, drawing a freight train, at a point where a public road, on which the truck was traveling, crosses at grade the tracks of the Buffalo,

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Rochester & Pittsburgh Railroad. It is admitted the truck did not stop before the attempt to cross the railroad tracks; the driver was heedless, and made the approach without in any way exercising the ordinary precautions due at a grade crossing. The truck was an open one, without top, so far as the passengers, who were nine or ten in number, were concerned, the only covering being over the driver's seat; and plaintiff's decedent was seated in the open part, on a seat longitudinally placed, facing the direction from which the train which killed him came.

An interesting question arose, as to the effect of deceased's want of care, considering the reckless conduct of the driver; but that we are not called on to determine, because no negligence on defendant's part was shown.

The negligence charged in the statement, and attempted to be substantiated on the trial is, that the train was run at a dangerous rate of speed in approaching the grade crossing, and that there was a failure, on the part of those operating the train, to blow the whistle or sound the bell as the train approached the crossing, so as to give warning of its approach to persons on the highway, who might intend to cross the tracks.

The vital question in the case is that of warning of the approaching train. The train was running in the open country, where railroad companies may move their trains at such rate of speed as the character of their machinery and roadbed may make practicable: *Rapp v. Central Railroad of Penna.*, 269 Pa. 266; *Schwarz v. Delaware, Lackawanna & Western R. R. Co.*, 218 Pa. 187. Nothing as to the rate of speed of the train could safely be predicated on what was said by plaintiff's witnesses; they had not observed its approach, until it was almost upon them, and saw it only for the most fleeting space of time, in the wild excitement and fear, which would necessarily seize upon persons, in a truck filled with people, facing possible death or serious injury. The driver of the truck called by plaintiff said he could

only guess at the speed. A passenger seated alongside of him, whose testimony shows he was inattentive to his surroundings, saw the locomotive, first, when it was but ten feet from the crossing, and then only the front end of it; he was not permitted to express an opinion as to its speed, because it was manifest he could form no accurate judgment whatever on the question. Another witness, Drauker by name, was seated with his back to the approaching train and saw the engine first when it was, he thought, about 150 feet from the crossing; at sight of it, he said, he "was kind of stunned for awhile," and tried to force himself to another place in the truck, apparently to minimize his danger as much as possible. This was the only witness who estimated the speed, and he testified that in his opinion the train was going 40 miles an hour. It is apparent that no controlling finding of fact could be predicated upon this bit of testimony, when we consider that, according to the witness's own story, nature's first law, that of self-preservation, was dominating his mind. This was all the testimony there was as to speed on the part of plaintiff, except that it was testified by the conductor of the train that the train "was not supposed to go over 35 miles per hour," that this was "as fast as we are allowed to run." The engineer testified to a speed of 30 miles an hour at the time of the accident. There was no reliable evidence in the case to show negligent speed, even if it could be assumed that, under the circumstances, 40 miles an hour was such.

As we said in the Schwarz Case (218 Pa. 187); "It is not the rate of speed that prevents a traveler from passing safely over a railroad crossing in an open country, but the failure to give notice of the approach of the train by those in charge of it, or disregard of such notice by the traveler when given. . . . It is not the rate of speed that is the negligence of the company, but the failure to give proper notice of the approach of the train."

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This brings us to the critical inquiry in the case, on the angle from which we are considering it. Was warning given of the approach of the train? To answer this inquiry, we have read all the testimony with painstaking care. The witnesses called by plaintiff to show that no warning was given, were the driver of the truck, the passenger seated on the front seat alongside of him, and another passenger, Drauker, who was seated in the body of the vehicle. The testimony of all three of them was negative,—that they did not hear,—and not one of them supplied the element of watchfulness and attention for a signal, necessary to meet defendant's positive proofs, in this regard. All agreed that the truck was ascending an incline to the tracks in second gear, at a speed of about 3 miles an hour and that the truck was making a noise. It was undisputed that, from a point 35 feet from the track, there was an unobstructed view of the train, in the direction from which it came, of from 400 to 450 feet. The driver testified, in answer to a query as to whether notice was given by either bell or whistle, that "the bell could have been ringing," but if the whistle had been blown "as [the train] rounded onto the crossing on the right-hand curve, I would have heard it"; the spot indicated was not the place fixed for the blowing of the whistle, however,—it was to be blown at a whistling post farther away. This witness categorically admitted, "I didn't stop, look and listen," and he, himself, differentiated between a positive assertion that the bell did not ring, and the negative one that he did not hear it, by saying, after stating that he heard no bell, that "It could have been possibly, there is a chance of it being ringing." Again, when answering the direct inquiry whether he would say the bell was not ringing, the witness said, "No." As to sounding the whistle, his testimony was entirely negative; he repeated the statement quoted, that the whistle was not blown, as the train came around the curve, and qualified this by saying that he meant "just as you come on the crossing."

Then he confined the distance of the train from the crossing, within which he would say the whistle was not blown, to 150 feet. In answer to the question, whether he would pretend to say the whistle was not blown at the whistling post, he admitted he would not say it was not blown there, and that he knew it was the regular place for the engineer to sound the whistle. The passenger, seated alongside him, in answer to the question whether the engine gave any warning as it approached the crossing, replied, "None that I heard."

The witness Drauker, sitting with his back in the direction from which the train approached, testified there were no signals given by the locomotive as it approached the crossing, but he based this statement on the fact that he did not hear them. Answering the question, "Do you know whether the whistle was blown down at the whistle post," he replied, "I don't know whether it was or not—I didn't hear it." This answer speaks for itself, so far as the legal rule regarding negative testimony is concerned, and shows that, on the critical question as to whether the whistle was blown where it was the duty to sound it, he was ignorant.

Against this negative and unsatisfying testimony, defendant produced evidence to show, by the engineer of the train, that he gave notice of the approach to the crossing by blowing the customary crossing approach signal, two long and two short blasts, at the place fixed for blowing it for the crossing in question; that the engine was provided with an automatic bell ringing device, which he turned on when he blew the whistle; that the bell commenced ringing and rang until after the train passed the crossing. The fireman, in corroboration of the engineer, as to the blowing of the whistle and ringing of the bell, testified that he shut the bell off, after the train stopped, following the accident, that he heard it ringing all the time, and that the reason why he, and not the engineer, turned the bell off was, because, when the train stopped, the engineer ran back to the

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point of the accident, leaving the bell ringing. The conductor also testified the bell continued to ring after the train had stopped, and this fact was further corroborated by a witness who was driving an automobile in the road behind the truck in which deceased was riding, who likewise testified that the bell continued to ring after the train stopped.

An important witness in the case, Paul Pantall, said he was coming toward the crossing from the opposite side from that on which the truck approached. He heard the train whistle as it was coming up behind him, looked out the side of his automobile, saw the train, stopped his automobile, and, after stopping, saw the truck in the road on the other side of the tracks approaching the crossing. He had the truck in view from the time he first saw it; seeing the driver change gears to make the ascent of the grade to the crossing, he screamed and halloed, and motioned to attract the attention of its occupants, but they were oblivious to his outcries. Another witness, Frank Bernardo, who lived about 300 feet from the crossing and who witnessed the accident, said he heard the train whistle for the crossing, and, at the time he heard the whistle, saw the automobile in the road approaching the tracks. Another witness, Lovejoy by name, who was waiting at the crossing to take a train going in the other direction, testified that he heard the train in question whistle, and, turning to look along the road, saw the truck in the road approaching the crossing about 180 feet distant. The witness Hazlett, whose testimony has been referred to heretofore, and who was driving in the road, behind the truck, testified that he heard the train whistle, with the truck in the road ahead of him, and, as has been stated, that he heard the bell ringing, after the train stopped. His wife, who accompanied him in the automobile, also said she heard the whistle.

In the light of this positive testimony produced by the defendant, no verdict could be permitted to stand in

plaintiff's favor, which was based on the negative and unsatisfactory evidence produced in her behalf, to establish negligence by a failure to give notice of the approach of the train: *Anspach v. Phila. & Reading Ry. Co.*, 225 Pa. 528; *Charles v. Lehigh Valley R. R. Co.*, 245 Pa. 496; *Leader v. Northern Central Ry. Co.*, 246 Pa. 452; *Rapp v. Central Railroad of Penna.*, 269 Pa. 266.

The judgment is affirmed.

Rolshouse v. Wally et al., Appellants.

Equity—Equity practice—Pleading—Scope of decree—Accounting—Partnership—Oil lease—Amendment.

1. Where a bill in equity prays for an accounting of profits in the operation of an oil lease particularly described, and the court finds that a partnership existed between plaintiff and defendants not only as to such lease, but also as to an adjoining lease, an accounting will only be directed as to the lease mentioned in the bill, inasmuch as the decree must conform to the pleadings.

2. In such case after a master has been appointed to adjust the rights of the parties, an amendment of the bill will not be allowed, so as to include in the accounting the operations on the adjoining lease.

3. Even if there had been no adjudication of the matters to be included in the accounting, the court could not amend its decree so as to embrace additional transactions, for there was nothing in the pleadings which justified its broadening.

Partnership—Compensation of partners for services.

4. Compensation of partners for personal services will not be allowed, where there is no provision for such in the partnership articles.

Argued October 21, 1921. Appeal, No. 204, Oct. T., 1921, by defendants, from decree of C. P. Allegheny Co., Oct. T., 1917, No. 55, on bill in equity, in case of *Charles O. P. Rolshouse v. W. C. Wally*. Before MOSCHZISKE, C. J., WALLING, SIMPSON, KEPHART, SADLER and SCHAFER, JJ. Affirmed.

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Bill in equity for an accounting.

Exceptions to report of George J. Kambach, Esq., master. Before HAYMAKER, J.

Decree for plaintiff. Defendants appealed.

Error assigned, inter alia, was decree, quoting it.

Thomas L. Morris, with him William A. Wilson and L. K. Porter, for appellants, cited: Lowenstein v. Biernbaum, 8 W. N. C. 301; Butler Savings Bank v. Osborne, 159 Pa. 10.

John E. Winner, for appellee, cited: Luther v. Luther, 216 Pa. 1; Summers v. Shryock, 46 Pa. Superior Ct. 231; Spangler Brewing Co. v. McHenry, 242 Pa. 522; Marsh's App., 69 Pa. 30; Delp v. Edlis, 190 Pa. 25.

OPINION BY MR. JUSTICE SADLER, January 3, 1922:

The plaintiff asked for an accounting from the defendants for profits arising from the operation of oil and gas wells located upon his land and the adjoining property of Swan. An answer denied any such liability. After hearing, the chancellor found a partnership relation not only as to the wells mentioned, but as to one drilled upon a third property, known as that of Alston. No decree was made, however, which required a settlement of accounts as to the latter well; there could not have been, as the judgment necessarily conformed to the pleadings in the case. Neither unproved allegations, nor matters not alleged, could have been made the basis of any equitable relief: *Luther v. Luther*, 216 Pa. 1; *Spangler Brewing Co. v. McHenry*, 242 Pa. 522; *Saupp v. Streit*, 258 Pa. 211, 215. It was not attempted to amend the pleadings so as to bring the third transaction properly before the court. On the contrary, the defendants denied any duty to account, and appealed from the decision of the court below in holding that this was their legal duty. The result was an affirm-

ance (*Rolshouse v. Wally*, 263 Pa, 247), which was conclusive, in so far as the decree sets forth its basis, method and subject-matter of the accounting required.

A master was then appointed to adjust the rights of the parties; whereupon, a motion was made to amend the order entered so as to include in the accounting the Alston operation, which had been conducted at a considerable loss. This application was refused, and properly so. "The purpose of a preliminary proceeding on a bill for an account is to determine for what, if anything, the defendant shall account. If, as here, plaintiff claims to be interested in more than one transaction with defendant, the decree conclusively determines for how many of them the defendant should account; or if, as here, they differ as to whether or not in regard to one of these transactions plaintiff is to have an agreed compensation, a specified commission or a share of the profits, the decree conclusively determines the matter also; each determination being with the same effect as if there had been separate suits as to the particular subject-matter of the accounting": *Robinson v. Fulton*, 262 Pa. 265.

Even if there had been no adjudication of the matters to be included in the accounting, the court below could not have amended its decree so as to embrace additional transactions, for there was nothing in the pleadings which justified its broadening. Had an effort been made to alter the latter, objection could well have been made that the attempt was too late: *Schenck v. Borough of Olyphant*, 181 Pa. 191; *Muehlhof v. Boltz*, 215 Pa. 124. Certainly, it is not to be permitted now: *Jackson v. Thomson*, 203 Pa. 622; *Pittsburgh v. Ry. Co.*, 230 Pa. 189.

Further complaint is made of the refusal of the master to award compensation to the defendants for the personal services rendered in the operation of the wells. The relationship of the parties was that of partners, as conclusively established by the earlier proceeding, which

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was affirmed. Under such circumstances, no allowance could be made, in the absence of some proof of a contract to pay: *Delp v. Edlis*, 190 Pa. 25; *Marsh's App.*, 69 Pa. 30. In view of the former finding, the authorities, cited by appellant, bearing on the respective rights of tenants in common in the settlement of their affairs are clearly inapplicable. The credit asked for was properly disallowed.

The decree of the court below is affirmed at the cost of the appellants.

McCullough's Estate.

Wills—Construction—Devise to wife—Life estate—Remainder—Absence of gift over—When intention not to give fee.

1. Where a testator devises real estate to his wife "for her use and maintenance and that of my minor children," gives her a full power of sale, and finally directs that all of his property after payment of legacies shall revert to his wife as executrix "according to the provisions mentioned and set forth in this my last will and testament," the wife takes a life estate, and if any real estate remains unsold at the death of the wife the children take it in remainder under the testator's will.

2. In such case the power to sell was not repugnant to the creation of a life estate in the wife.

3. The absence of a gift over on the death of the wife, does not, under the particular wording of the will, vest a fee in the wife.

4. Though the absence of a gift over is some indication of a purpose to give to the first taker an estate in fee, yet the will as a whole may disclose a contrary intention.

Argued October 25, 1921. Appeal, No. 195, Oct. T., 1921, by Potter Title & Trust Co., guardian of Lovisa McCullough, from decree of C. C. Allegheny Co., May T., 1921, No. 276, dismissing petition to revoke order to sell real estate, in estate of John McCullough, deceased. Before MOSCHISKER, C. J., FRAZER, SIMPSON, KEPHART, SADLER and SCHAFFER, JJ. Reversed.

Assignment of Error—Opinion of the Court. [272 Pa.

Petition to revoke order to sell real estate. Before MILLER, P. J.

The opinion of the Supreme Court states the facts.

Petition dismissed. Potter Title & Trust Co., guardian of Lovisa McCullough, appealed.

Error assigned, among others, was above decree, quoting it.

P. K. Motheral, with him *George D. Wick* and *Reed, Smith, Shaw & Beal*, for appellant.—The wife took a life estate: *Fuller v. Wilbur*, 170 Mass. 506; *Bennett v. Sutphen*, 266 Pa. 168; *Fidelity Trust Co. v. Bobloski*, 228 Pa. 52; *Henninger v. Henninger*, 202 Pa. 207.

W. W. Stoner, of *J. M. Stoner & Sons*, for appellee, cited: *Bennett v. Sutphen*, 266 Pa. 168.

OPINION BY MR. JUSTICE SADLER, January 3, 1922:

John McCullough died June 24, 1886, leaving a widow and three children. By his will he provided, inter alia, as follows: "I give and bequeath to my beloved wife, L. C. McCullough, all my property, real and personal, for her use and maintenance and that of my minor children, except my daughter Mary Jane above mentioned and provided for in this instrument, my real estate consisting of the house now occupied by me No. 250 Allegheny Avenue, in the City of Allegheny.

"And I further give and bestow full power and authority to my said wife to sell, lease or rent the said house and appurtenances in any way or manner she may think most conducive to her own interest and that of my minor children."

Various sums, payable at named times, were bequeathed to the children by a codicil. In the last clause there is this direction: "It is my will and desire that all my property, real and personal, shall, after the payment of the legacies and bequests above mentioned, revert to

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my wife as executrix, according to the provisions mentioned and set forth in this my last will and testament, and no bond or appraisal required."

The widow survived and died on February 22, 1917. By her will, a one-seventh part of her estate was given in trust, for Lovisa McCullough, a minor daughter of her son, who had died intestate, leaving a widow and this one child. The trustee, so named, secured leave from the orphans' court to sell the interest of the minor in the real estate of which John McCullough died seized, averring that, by the devise of the grandfather, an estate in fee simple had passed to the grandmother, and that the grandchildren, under the will of the latter, had a one-seventh interest therein. Subsequently, the appellant, as guardian, asked for a revocation of the order made, it being insisted that only a life estate passed under the will of the grandfather, with a vested remainder in his three children, and that the interest of the ward was one-third, subject to the dower rights of her mother. The contention of the trustee was upheld, and the petition was accordingly dismissed; from the order so made this appeal was taken.

There is but one question which requires solution: Did the wife become immediately vested with the entire estate, both personalty and realty, absolutely and in fee, or did she take but an estate for life, with the remainder to the children?

It is to be noted that the property was devised "for her use and maintenance and that of the minor children," and in this respect differs from the cases of *Fidelity Trust Co. v. Bobloski*, 228 Pa. 52, and *Bennett v. Sutphen*, 266 Pa. 168, relied upon by the court below, where, to the devise to the wife, there was added a request that she educate and assist her children. It is further to be observed that provision was made in the codicil for the payment of various sums to the latter at times specified. The balance was to revert to the mother, not as an individual but as executrix, and for the express purpose

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defined in the will of supporting herself and family. Ordinarily, a devise to one "and her children" passes but a life estate to the first taker with remainder in fee to the children as a class (*Hague v. Hague*, 161 Pa. 643; *Crawford v. Forest Oil Co.*, 208 Pa. 5; *Elliott v. Diamond Coal & Coke Co.*, 230 Pa. 423; *Chambers v. Union Trust Co.*, 235 Pa. 610), and the same has been held to be true where a trust was created for a daughter "for her and her children's sole use and benefit": *Vaughan's Est.*, 230 Pa. 554.

In the present case, a power to sell was given, but such superadded privilege is not repugnant to the creation of a life estate (*Henninger v. Henninger*, 202 Pa. 207), and the purpose in so directing clearly arose from the desire of the testator to provide funds with which to furnish proper support for the family. A power to consume makes possible the use of the proceeds of sale by the one named as donee, but if there be a failure to convert the realty, or a portion thereof, what remains unconsumed will pass through the will of the donor (*Nie-man's Est.*, 229 Pa. 406; *Allen v. Hirlinger*, 219 Pa. 56; *Fassitt v. Seip*, 240 Pa. 41; and this is true though a sale has taken place and the sums received have been reinvested: *Trout v. Rominger*, 198 Pa. 91; *Gross v. Strominger*, 178 Pa. 64; *Huber's Est.*, 249 Pa. 90. If the grandmother in the present case was possessed merely of a life estate with a power to consume,—the property here involved was not disposed of in her lifetime,—then the petitioner, as the representative of her father, became possessed of a one-third thereof, subject to the dower interest of her mother: *Morris's Est.*, 270 Pa. 120.

The learned court below was of the opinion that the principles suggested were not controlling in the present case because of the absence of a gift over upon the death of the grandmother, and applying the general rule that a devise generally or indefinitely, with power of disposition, carries a fee, held the estate which passed to have

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be absolute. "With the desire to reduce to a minimum the perplexity and uncertainty inseparable from the subject, courts have established certain artificial and arbitrary canons of construction, by which certain forms of expression are presumed to have certain meanings, and in doubtful cases these presumptions are held to be decisive. But all of these canons are subservient to the contrary rule as to intent, and are made to aid, not to override it": *Woelpper's App.*, 126 Pa. 562.

By the Act of April 8, 1833, P. L. 249, it is provided: "A devise of real estate shall pass the whole estate of the testator in the premises devised. . . . unless it appear by devise over or by words of limitation, or otherwise, in the will that the testator intends to devise a less estate." Though the absence of such a gift of the remainder is some indication of a purpose to give to the first taker the estate in fee, yet the will as a whole may disclose a contrary intention. This has been held under the following circumstances: where the estate was expressly limited to life (*Reynolds's Est.*, 175 Pa. 257; *Shaner v. Wilson*, 207 Pa. 550); where certain legacies were directed to be paid after the death of the first taker (*Nevin's Est.*, 192 Pa. 258); and where the testator directed that the estate should be held "without giving security as life tenant therefor": *Freeman's Est.*, 220 Pa. 343.

Disregarding artificial rules of construction, which are of assistance only in discovering the intent of a testator in doubtful cases (*Tyson's Est.*, 191 Pa. 218; *Rogers's Est.*, 245 Pa. 206), the purpose of the grandfather in the present case is apparent. The devise was not to the widow alone with direction to aid the offspring, but expressly for "her use and maintenance and that of my minor children." No intention to give to her an absolute estate in the whole is to be found. The contrary is most clearly indicated by the last paragraph of the codicil, which provides that any balance after payment of certain legacies should revert to her as executrix and not

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as an individual. As executrix and guardian of the children under the will of her husband, it was within her power to use such of the fund as might be required for their joint maintenance, but this necessity seems not to have arisen, as the real estate remained unsold at the time of her death. Her life estate having terminated, those in remainder have become the owners in fee, and the petitioner in the court below, representing as she does her father, now deceased, is entitled to one-third, subject to the dower interest of her mother.

The assignments of error are sustained, and the decree appealed from is reversed, and it is ordered that the record be remitted to the court below for further proceedings. The costs are directed to be paid from the estate of the appellant.

Croft, Appellant, v. Cheltenham Trust Co. et al.

Wills—Construction—Devise—Fee cut down by subsequent words—Sale of real estate—Distribution of proceeds—Limitation of devise—Trust—Precatory and mandatory words—"Desire"—"Wish"—Words and phrases.

1. Such words as "desire" or "wish," generally precatory, when used in connection with an act to be done by some person named by testator, are mandatory when expressive of the intent of testator to be carried out without the intervention of another's will.

2. Where testatrix gives her real estate to her husband, except one parcel, and later in the will directs, "I also desire, should my husband wish to dispose of all the remainder of the real estate, in my name, he may do so with the provision that my daughter. . . . receives two-thirds of the proceeds of said sale," the daughter is entitled to two-thirds of the proceeds of whatever real estate her father sells.

Argued January 4, 1922. Appeal, No. 4, Jan. T., 1922, by plaintiff, from judgment of C. P. No. 5, Phila. Co., June T., No. 410, on question of law raised by affidavit of defense, in case of Jacob R. Croft v. Cheltenham

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Trust Co. and Alice Croft. Before MOSCHZISKER, C. J., FRAZER, WALLING, KEPHART and SADLER, JJ. Affirmed.

Assumpsit to recover money had and received. See 30 Pa. Dist. R. 377.

The opinion of the court below was in part as follows, by MARTIN, P. J.:

"Elizabeth A. Croft died seized of real estate situated in.....Philadelphia. By the terms of her will she devised it thus: 'After paying my funeral expenses, I give to my husband, Jacob R. Croft, the real estate, in my name, with the exception of the property 5216 Knox Street, Germantown, which I desire sold to reimburse my daughter Ida M. Croft for notes which she holds for money advanced at various times. The remainder of the proceeds of this sale to be equally divided between my four children: Sarah Elizabeth Baker, Ida Mirlam Croft, Morris Hall Croft, Alice Croft. I also desire, should my husband Jacob R. Croft wish to dispose of all the remainder of the real estate, in my name, he may do so, with the provision, that my daughter Alice Croft receive two-thirds of the proceeds of said sale.'"

A property, situated No. 5222 Knox Street, which belonged to the estate, was sold. Jacob R. Croft and his daughter Alice Croft executed the deed conveying it to the purchaser. Of the proceeds, one-third was paid to Jacob R. Croft, and two-thirds, claimed by Jacob R. Croft and also by Alice Croft, the daughter of testatrix, was deposited in the Cheltenham Trust Company.

Suit was instituted by Jacob R. Croft against the trust company. Upon presentation of a petition, the trust company was permitted to pay the money into court, and an interpleader was granted in which Alice Croft became a defendant.

A statement of claim was filed by the plaintiff, Jacob R. Croft, containing a copy of the will of Elizabeth A. Croft, under which plaintiff claims that the property sold was vested in him in fee, and that he is entitled to the entire proceeds of sale.

An affidavit of defense was filed by the daughter in the nature of a demurrer, raising a question of law upon the construction of the will of Elizabeth A. Croft, the intervening defendant, Alice Croft, claiming that by the terms of the will she is entitled to two-thirds of the proceeds of the sale.

In construing the will, the intention of the testator must govern.

While the gift to Jacob R. Croft of the real estate, standing alone, would carry a fee, the subsequent provision, which came into effect when he disposed of the remainder of the real estate, indicates the intention of the testator to limit the interest of her husband to one-third of the proceeds of sale. Any other construction would render nugatory the gift to her daughter Alice of two-thirds of the proceeds of the sale of the remainder of her real estate, and that portion of the will would be meaningless.

The opinion of the auditing judge of the orphans' court was in part as follows, by GEST, P. J.:

It was argued on behalf of Jacob R. Croft that he was given an absolute estate, or fee, in the residuary real estate, which was not cut down by the subsequent words, limiting the power of the devisee over the estate; but the auditing judge is not convinced by this argument. Undoubtedly Jacob R. Croft had the power to dispose of the real estate; the will expressly says that he may do so. There is no restraint on alienation. The testatrix merely expresses her "desire," that is her will, that, if he sells the property, Alice should receive two-thirds of the proceeds, and the question is, are those words expressive of desire merely precatory, or do they impress a trust on the proceeds? It will be observed that the testatrix used the word "desire" three times in her will, and, in the other two there can be no doubt that she intended a positive direction.....

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The auditing judge is of opinion that the testatrix intended to give Alice two-thirds of the proceeds of the residuary real estate. The testatrix was dealing with her own property, and her intention is reasonably clear. It will be observed that she does not express a mere desire that Jacob R. Croft, if he sold the properties, should, himself, give two-thirds of the proceeds to Alice; she says that he may sell the properties with the provision that Alice receives two-thirds of the proceeds. Such words as desire or wish, generally precatory, when used in connection with an act to be done by some person named by the testator, are mandatory when expressive of the intent of the testator to be carried out without the intervention of another's will: *Dickinson's Est.*, 209 Pa. 59.

Judgment for defendant, Alice Croft. Plaintiff appealed.

Error assigned was judgment, quoting it.

William E. Caveny, with him *H. James Sautter*, for appellant.

Sheldon F. Potter, for appellees, was not heard.

PER CURIAM, February 6, 1922:

The facts in this case are sufficiently shown by the opinion of the court below, where the right conclusion is stated, and also in the opinion of Judge GERT, on the will here involved, when before the Orphans' Court of Philadelphia County. The excerpts from these opinions which appear in the notes of the Reporter are adopted by us.

The judgment is affirmed.

Sheplan et al., Appellants, v. Kramer Woodworking Co.

Negligence—Piling boards in street—Evidence—Case for jury—Infants.

In an action for damages for personal injuries to a child ten years old, suffered while playing around a pile of logs placed by defendant in a street, a verdict for defendant will be sustained, where the evidence for plaintiff tended to show that the logs were so carelessly piled that they were liable to roll down and injure children playing about them, while defendant's evidence showed due care.

Argued January 5, 1922. Appeal, No. 32, Jan. T., 1922, by plaintiffs, from judgment of C. P. No. 2, Phila. Co., March T., 1919, No. 1482, on verdict for defendant, in case of Bernard Sheplan, by his next friend and father, Charles Sheplan, and Charles Sheplan, in his own right, v. Kramer Woodworking Co., Inc. Before MOSCHZISKER, C. J., FRAZER, WALLING, SIMPSON, KEPHART, SADLER and SCHAFER, JJ. Affirmed.

Trespass for personal injuries. Before WESSEL, J.

The opinion of the Supreme Court states the facts.

The trial judge affirmed defendant's first point, which was as follows:

"1. The defendant was not bound to anticipate that trespassers would pry the beams loose from their fastenings and is therefore not responsible for any accident which occurred by reason of such acts."

Verdict and judgment for defendant. Plaintiffs appealed.

Error assigned was charging as above, quoting it.

Max Aron, with him Jacob Weinstein, for appellant.

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T. R. White and *H. W. Moore*, for appellee, were not heard.

PER CURIAM, February 6, 1922:

Plaintiffs sued to recover for injuries to Charles Sheplan, a ten-year-old child, alleged to have been suffered by him through defendant's negligence. The issues involved were submitted to the jury, who found a verdict for defendant, upon which judgment was entered; plaintiffs have appealed.

Defendant manufactures articles made of wood; one of its places of business is located on North 9th Street, Philadelphia, in front of which was piled a quantity of boards and logs; one of these logs rolled upon, and injured, the minor plaintiff, while he was playing around the pile. Plaintiffs' evidence tended to prove that the logs were so carelessly piled that an accident of the kind here complained of was apt to happen, while defendant's evidence showed due care, and the verdict indicates the jury believed the latter. After reading the testimony and examining the entire record, we find no reversible error.

The judgment is affirmed.

North Penn Bank v. Whetstone, Appellant.

Promissory notes—Time of payment—Condition—Presentment—Reasonable time—Affidavit of defense—Insufficiency.

1. Where a promissory note payable on demand is given with the condition that payment thereof shall not be demanded until the maker has satisfied his present creditors to an amount named, the obligation is absolute, and the only thing uncertain is the matter of time.

2. In an action on such note brought four years after its date, an affidavit of defense is insufficient which avers that the maker "has not been able to satisfy his creditors" to the amount named in the agreement, and therefore the note is not due and payable.

520 NORTH PENN BANK v. WHETSTONE, Appellant.

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3. A demand note must be presented for payment within a reasonable time after it is issued, both at common law and under the Negotiable Instruments Act of 1901; four years would seem to be the limit of a reasonable time.

Argued January 5, 1922. Appeal, No. 39, Jan. T., 1922, by defendant, from order of C. P. No. 3, Phila. Co., June T., 1920, No. 7770, making absolute rule for judgment for want of a sufficient affidavit of defense, in case of North Penn Bank to use v. Walter Whetstone. Before MOSCHZISKER, C. J., FRAZER, WALLING, SIMPSON, KEPHART, SADLER and SCHAFFER, JJ. Affirmed.

Assumpsit on promissory note.

Rule for judgment for want of sufficient affidavit of defense.

The court below filed the following opinion by FERGUSON, J.:

This is an action upon a promissory note dated March 9, 1917, for \$4,000, payable on demand to the North Penn Bank. The affidavit of defense does not deny the execution of the note or the receipt of a valuable consideration, but sets up that an indebtedness previously owing by defendant to the North Penn Bank was adjusted by the surrender to the defendant of his then existing obligations and securities, upon the payment of the sum of \$11,000, and the delivery of the note in suit. Payment of this note, it is averred, was not to be demanded until defendant had satisfied his "present creditors to the extent of \$100,000." It is further averred that defendant "has not been able to satisfy his creditors as specified in said agreement to the amount of \$100,000, and therefore the said note is not due and no demand can lawfully be made for payment thereof by him."

In our opinion the defense is insufficient. The obligation to pay the note is absolute. There is no controversy as to the consideration for it. The debt does not come into existence upon the happening of certain events.

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The only condition attached is the one that payment shall not be demanded until certain events happen. These events are to be performed by defendant. If he had other indebtedness, an obligation rested on him to discharge it, and the parties must have contemplated such discharge as well as the payment of the note in suit within a reasonable time. The note is not to become an obligation "if" the defendant pays his other creditors, but represents an absolute indebtedness which may be demanded "when" those creditors are satisfied. To assert, as the affidavit does, that the defendant has not been able to discharge this indebtedness is not to the point. His contention is that the note was payable when he discharged certain other indebtedness, not when he was able.

This is not a case of a contract to pay a debt out of a certain fund. Neither is it an obligation payable at the convenience of the obligor: *Kreiter v. Miller*, 1 Pennypacker 46. It is an absolute contract to pay. The only thing uncertain is the matter of time. Since the parties allowed that time to be dependent on the payment of other obligations, the law must fix the time when those other obligations should be discharged. A reasonable time only may be permitted for this and four years is certainly as much time as could be asked. This is especially true when we consider that a demand note under the provisions of the Negotiable Instrument Act of 1901, section 71, must be presented for payment within a reasonable time after it is issued. The lapse of two more years might raise a serious question as to the bar of the statute of limitations. See *Second Nat. Bank of Reading v. Yeager*, 268 Pa. 167; 8 Corpus Juris 412, and note.

The rule for judgment is made absolute.

Defendant appealed.

Error assigned was order, quoting record.

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Thomas Raeburn White, with him *Albert B. Maris*, for appellant, cited: *Marquis v. McKay*, 216 Pa. 307; *Breneman v. Furniss*, 90 Pa. 186; *Kennett Sq. Nat. Bank v. Shaw*, 218 Pa. 612; *Keller v. Cohen*, 217 Pa. 522; *Cook v. Carpenter*, 212 Pa. 165.

John C. Gilpin, with him *Graham & Gilfillan*, for appellee, cited: *Rossmassler v. Spielberg*, 270 Pa. 30; *Swearingen v. Dairy Co.*, 198 Pa. 68; *First Nat. Bank of Canton v. Innes*, 66 Pa. Superior Ct. 425; *Harrison v. Atlee*, 38 Pa. Superior Ct. 241; *Second Nat. Bank of Reading v. Yeager*, 268 Pa. 167.

PER CURIAM, February 6, 1922:

This case is sufficiently covered by the opinion of the court below, and, thereon,

The judgment is affirmed.

Commonwealth v. Patterson, Appellant.

Criminal law—Murder—New trial—After-discovered evidence—Discretion of court.

1. The Supreme Court will not, in a murder case, reverse the action of the court below in refusing a new trial, except in case of a manifest abuse of discretion.

2. Where the application for a new trial is based on after-discovered evidence, the refusal of a new trial will be sustained, where it appears that the so-called after-discovered evidence, might have been produced at the trial, that it related to very trivial matters, not vital to the case, and that it should not and probably would not result in a different verdict.

Appeals—Assignments of error—Criminal law—Murder—Confession.

3. The Supreme Court will not, at the argument of an appeal in a murder case, consider a complaint as to the manner in which a confession was secured, where no error was assigned to the admission of the confession.

1922.] Statement of Facts—Opinion of the Court.

Argued January 4, 1922. Appeal, No. 496, Jan. T., 1921, by defendant, from judgment of O. & T. Northampton Co., April T., 1921, No. 26, on verdict of murder of the first degree, in case of Commonwealth v. Archie Adolph Patterson. Before MOSCHZISKE, C. J., FRAZER, WALLING, SIMPSON, KEPHART and SADLER, JJ. Affirmed.

Indictment for murder. Before MCKEEN, P. J.

The opinion of the Supreme Court states the facts.

Verdict of guilty of murder of the first degree, upon which sentence was passed. Defendant appealed.

Error assigned was refusal of new trial.

James W. Fox, with him *Francis H. S. Ede* and *Harry D. Kutz*, for appellant.

T. McKeen Chidsey, District Attorney, with him *Albert F. Kahn*, Assistant District Attorney, for appellee.

OPINION BY MR. JUSTICE WALLING, February 6, 1922:

This appeal by Archie Adolph Patterson is from judgment pronounced upon him on conviction of first degree murder, for the killing of his de facto wife, Maud Duran. They were colored people and, in February, 1921, came from New York City to East Bangor, Northampton County, where he had employment in a slate quarry. They boarded with a colored family named Smith and, to outward appearances, lived happily; however, they had a trifling quarrel Saturday evening, March 5th, and on Monday morning (March 7th) defendant declined to go to his work, alleging sickness, and, when alone with Maud Duran, in the dining room of the Smith home, fatally stabbed her in the neck with a butcher knife; he then fled, but was apprehended the same day, and later made a confession in which he admitted an intent to kill and every fact necessary to constitute murder of

the first degree. As a witness at the trial, however, while admitting he struck the fatal blow, defendant stated, in substance, that he did not intend to hit Mrs. Duran but merely to frighten her and that she suddenly moved forward so as to come in contact with the knife. Under the charge of the trial judge, the defendant had the full benefit of this defense, but the jury properly rejected it. Not only defendant's confession but all the circumstances, including the fact, as shown by Commonwealth's evidence, that he secured the knife on the previous day, that he remained at home feigning sickness, that he immediately sought safety in flight, that he made unjust complaint of Mrs. Duran's deportment and was causelessly jealous of her and afraid she would leave him, as well as the absence of an immediate cause, all point to a premeditated homicide. Plunging the butcher knife into the victim's neck, and thence into the lungs, manifest an intent to take life, for a man is presumed to intend the natural and probable consequences of his voluntary acts.

The only error assigned is the refusal to grant a new trial on the ground of after-discovered evidence. This court has often said we cannot reverse the action of the court below in passing upon an application for a new trial, except in case of a manifest abuse of discretion. We have carefully examined the entire record, but find nothing to justify setting aside the verdict. The so-called "after-discovered evidence" relates to very minor matters, not vital to the case, and should not and probably would not result in a different verdict on another trial. As defendant admits he armed himself with this deadly weapon and did not strike in self-defense, and the jury found it was not an accident, it is of little moment whether he struck down this unarmed and defenseless woman while she was sitting or standing. Furthermore, by reasonable diligence, the alleged new evidence might have been produced at the trial.

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On the argument complaint was made as to the manner in which the confession was secured, but no error is assigned to its admission, and, hence, it is not properly before the court; moreover, in this, as in all other respects, the trial judge carefully safeguarded the rights of the defendant.

The assignment of error is overruled, the judgment is affirmed and the record is remitted to the court below for the purpose of execution.

McNeill, Appellant, v. Director General of
Railroads.

Workmen's compensation—Railroads—Master and servant—Interstate commerce.

1. Where a train has any interstate cars in it, it must be treated as an interstate train, in determining whether or not the carrier is liable for an accident occurring in its operation.

2. Interstate commerce is directly affected and the rules applicable thereto apply when a train containing interstate cars is being cut, so that a new car may be added at such a place in the train as to facilitate its delivery and the delivery of the other cars, when they reach their destination.

3. The movement of a train containing interstate cars, to a point where it is to be broken up into a number of separate trains, is a movement in interstate commerce.

4. Not decided whether or not an employee engaged in interstate commerce can obtain relief under the Workmen's Compensation Act, if he is injured by another carrier than his employer.

5. *Murray v. Pgh., C., C. & St. L. R. R. Co.*, 263 Pa. 398, distinguished.

Argued January 4, 1922. Appeal, No. 29, Jan. T., 1922, by plaintiff, from judgment of C. P. No. 2, Phila. Co., June T., 1920, No. 644, affirming decision of Workmen's Compensation Board, in case of Frances M. McNeill v. Director General of Railroads, United States Railroad Administration of Philadelphia and Reading Railroad Co. Before MOSCHISKER, C. J., FRAZER,

526 McNEILL, Appellant, v. DIR. GENERAL OF R. R.

Statement of Facts—Opinion of the Court. [272 Pa.
WALLING, SIMPSON, KEPHART and SADLER, JJ. Af-
firmed.

Appeal from decision of Workmen's Compensation
Board. Before BARRATT, P. J.

The opinion of the Supreme Court states the facts. ..
Appeal dismissed. Plaintiff appealed.

Error assigned, inter alia, was judgment, quoting it.

*Harry A. Gorson, with him John J. McDevitt, Jr., for
appellant, cited: Michigan Cent. R. R. v. Vreeland, 227
U. S. 59; Chicago & A. R. R. v. Wagner, 239 U. S. 452;
Murray v. R. R., 263 Pa. 398.*

*George Gowen Parry, with him Charlemagne T.
Wolfe, for appellee, cited: N. Y. C. R. R. v. Winfield,
244 U. S. 147; Second Employer's Liability Cases, 223
U. S. 1; N. C. R. R. v. Zachary, 232 U. S. 248; Northern
P. Ry. v. State of Washington, 222 U. S. 370; New York
Cent. & H. R. R. v. Carr, 238 U. S. 260.*

OPINION BY MR. JUSTICE SIMPSON, February 6, 1922:

Joseph V. McNeill, a brakeman of defendant, while
working on its right-of-way, was struck by another train
and received injuries from which he died the same day.
His widow, on behalf of herself and their minor children,
presented a claim petition under the Workmen's Com-
pensation Act; the referee held that decedent was en-
gaged in interstate commerce at the time of the injury
and hence the claim was not compensable; the Work-
men's Compensation Board and the court below sus-
tained this ruling, and from the judgment of the latter
tribunal plaintiff appeals.

It is admitted there were interstate cars in the train
on which decedent was working, but it is alleged the
train crew were engaged in a "purely shifting operation
or local movement," and hence, under *Murray v. Pgh.*,

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C., C. & St. L. R. R. Co., 263 Pa. 398, interstate commerce was not affected and the rules applicable thereto do not apply. In answer, it is sufficient to point out the vital distinction that, in the case cited, a purely local car, which had not been and was not intended to be a part of the train, was being shifted from one part of the yard to another, to be left at the latter point; while in the instant case, as appellant herself says, this interstate train was being "cut so that another car might be made a part" thereof "in station order," that is, so that each car when it reached its destination might readily be detached and the train sooner proceed, thus the interstate as well as the intrastate transportation being the better effected. This necessarily had a direct bearing upon interstate commerce and makes the entire train, so far as liability is concerned, an interstate train: Northern Pacific Railway Co. v. State of Washington, 222 U. S. 370; Phila. & Reading Ry. Co. v. Hancock, 253 U. S. 284. It is true that, after the train had gone a little further, it was to be broken up into several trains, which would proceed separately to the ultimate destination of the cars therein; but this progress towards the point of division was as much a movement in interstate commerce, as was the further movement of those cars to the place to which they were routed: Phila. & Reading Co. v. Hancock, *supra*.

It is further contended by appellant that since decedent was injured by the negligent act of a railroad which was not his employer, the federal law does not apply, and hence she may invoke the provisions of our Workmen's Compensation Act. To this it need only be said that the evidence fails to disclose the basic fact upon which the claim is made, namely, that decedent was injured by a railroad which was not his employer. All that is shown touching this point is that decedent was killed by "a train from Washington to New York, operated over the Royal Blue Line; over the Reading, B. & O., and Central Railroad of New Jersey"; it does not

appear which of them was operating it at the time of the accident. The burden of establishing her right to recover being upon appellant, her failure to prove that some other railroad than defendant was responsible for the injury occurring on its right-of-way, necessarily compels us to hold that her contention upon this point fails for this reason at least.

The judgment of the court below is affirmed.

O'Malley, Appellant, v. O'Malley.

Practice, C. P.—Affidavit of defense—Doubtful averments—Res adjudicata.

1. An evasive affidavit of defense is bad.

2. If an affidavit of defense leaves in doubt exactly what it means, the doubt must be resolved in favor of the plaintiff.

3. An averment in an affidavit of defense that a pending cause of action had been determined in a prior proceeding, must be so exact and full as to remove all doubt on the subject. Hence the facts in regard to the prior case must be fully set forth in the affidavit, or the proceedings must, by reference, be incorporated in the affidavit.

Entireties—Estate by entireties—Husband and wife—Effect of divorce—Deed—Lease—Division of income—Equity.

4. A title by deed retains the incidents which pertain to it at its inception. Hence a divorce of the parties does not destroy the incidents of an estate by entireties, either as relates to the final disposition of the property or to its income while both parties are alive.

5. The incidents of an estate by entireties are that the income of the property belongs to each in its entirety and not to one exclusively, and the corpus passes to the survivor unaffected by anything which the decedent may have done.

6. The right of either spouse to lease a property held by entireties and to collect the rent thereof, is not an incident of such an estate, but only flows from the fact that the parties hold by entireties.

7. The acts relating to the property of married women do not alter the incidents of an estate by entireties, but since their passage a purchaser of the title of one acquires no right of possession during the life of the other, neither can sell even the expectancy

1922.] Syllabus—Arguments.

of survivorship, without the joinder of the other, nor can a valid title to the income or expectancy of survivorship of one be obtained by a sheriff's sale or under proceedings in bankruptcy.

8. After a divorce, unless some other equity has intervened, a court distributing the income of an estate held by entireties, will divide it equally between the parties.

9. So too the parties, after a divorce, may agree to the disposition of such income, and the agreement will be binding and enforceable.

10. After a divorce, if one of the parties collects more than an equal portion of the income, the law will imply a promise to pay to the other his or her fair share thereof.

Case law—Opinions—General expressions—Maxim.

11. General expressions in an opinion must always be limited to the facts of the case. If this were not so, every dictum would become a binding precedent.

12. Myer's Estate (No. 2), 232 Pa. 95, distinguished.

Argued January 5, 1922. Appeal, No. 277, Jan. T., 1922, by plaintiff, from judgment of Superior Court, Oct. T., 1921, No. 197, reversing order of C. P. No. 4, Phila. Co., March T., 1921, No. 1359, making absolute rule for judgment for want of a sufficient affidavit of defense, in case of Mary O'Malley v. Patrick O'Malley. Before MOSCHZISKER, C. J., FRAZER, WALLING, SIMPSON, KEPHAET, SADLER and SCHAFER, JJ. Reversed.

Assumpsit for share of rentals.

Appeal from Superior Court.

The opinion of the Supreme Court states the facts.

Judgment of common pleas reversed. Plaintiff appealed.

Error assigned was, inter alia, judgment, quoting it.

Elton J. Buckley, for appellant.—The common law right of the husband to the entire usufruct of an estate by entireties during the joint lives of his wife and himself was not an incident of that estate, but was part of his common law marital rights: *Hiles v. Fisher*, 144 N. Y.

Arguments—Opinion of the Court. [272 Pa.

306; Roulston v. Hall, 66 Ark. 305; Thornley v. Thornley, 2 Ch. 229.

The law as laid down by the Superior Court is wholly inconsistent with the fundamental view which the Pennsylvania law has always taken as to the rights of the parties in tenancy by entireties: *McCurdy v. Canning*, 64 Pa. 38.

W. Horace Hepburn, Jr., for appellee, cited: *Hilt v. Hilt*, 50 Pa. Superior Ct. 455; *Alles v. Lyon*, 216 Pa. 604; *Meyers's Est.*, 232 Pa. 95; *Stuckey v. Keefe*, 26 Pa. 397.

OPINION BY MR. JUSTICE SIMPSON, February 6, 1922:

Plaintiff sued in assumpsit for an accounting of the rents of a property which had been conveyed to defendant and her while they were husband and wife, but which, after they were separated, he had leased, and appropriated the whole thereof to his own use and continued so to do though they were now divorced. Upon a rule for judgment for want of a sufficient affidavit of defense, the court of common pleas directed him to file an account; this the Superior Court reversed, without awarding a procedendo, and from its judgment we allowed the present appeal.

The case might well be determined in favor of appellant for a reason not adverted to in the opinion of the latter court. The statement of claim avers that after their separation "an arrangement was made between the parties that the said premises should be placed in the hands of Worster & Krider, real estate agents, for rental, and that said agents should pay plaintiff one-half of the net revenues of said property from then on"; that subsequently "defendant without plaintiff's knowledge or consent.....removed said property from the hands of Worster & Krider and placed it in the hands of one Cyril E. Hepburn, [and.....when] she protested, defendant.....delivered to her a registered letter informing her that he had removed the said premises from her posses-

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sion, but agreeing to pay plaintiff one-half of the net revenues of said property and to properly care for plaintiff's interests"; that thereafter the new agent had collected the rents, but plaintiff had received nothing on account thereof. The affidavit of defense "denies that in violation of any agreement, he [defendant] removed said property from the hands of Worster & Krider, and denies any agreement whatsoever; he denies that Cyril E. Hepburn regularly collected the rentals from said premises," but he does not deny that he received them, or that he made the agreement "to pay plaintiff the one-half of the net revenues of said property," which agreement would of course be enforceable, since each had an interest in the accruing rents. The averment that he "denies any agreement whatsoever," from its context evidently has relation only to the Worster & Krider agency, or is so evasively stated as to leave it doubtful to what it does refer, and hence the doubt must be resolved in favor of plaintiff: *Erie City v. Butler*, 120 Pa. 374; *Law v. Waldron*, 230 Pa. 458.

Despite this, we prefer to decide the case upon the broader ground argued at length in the Superior Court and here; considered thus, two questions arise: (1) Whether or not, after the divorce, defendant had a right to retain to his own use all the rents, without accounting to plaintiff for any part thereof?; and (2) Whether a prior proceeding in equity, instituted in another court and dismissed on demurrer, is conclusive of plaintiff's claim in the present case?

So far as this latter question is concerned, the affidavit of defense simply says that a bill in equity was filed for an accounting of these rents, a demurrer to it was sustained, and thereby the "said matter has been adjudicated"; it does not allege who filed the bill, does not set forth the demurrer or state why it was sustained, and does not by reference incorporate the proceedings in that case into the affidavit of defense in this; its averments are, therefore, insufficient to defeat the present

action: *Blood v. Crew Levick Co.*, 177 Pa. 606; *Feather v. Hustead*, 254 Pa. 357.

Upon the main question the authorities, in other jurisdictions, are in hopeless conflict. Admittedly the great weight thereof is that by a divorce the unity which is essential to an estate by entireties is destroyed, and hence it is converted into a tenancy in common: 21 Cyc. 1201; 13 R. C. L. 1121-3; 30 L. R. A. 333, n.; 10 L. R. A. (n. s.) 463, n.; L. R. A. 1915 C 396, n. We have held, however, that after a divorce the estate retains the incidents which pertained to it at its inception: *Alles v. Lyon*, 216 Pa. 604. True, the question raised in that case affected only the right of possession while the former husband and wife were still alive, but the reasoning of the opinion applies equally well to the accruing income, and since it is sound in principle we intend to apply it thereto. Indeed, when the cases elsewhere are examined, it will be found that this ancient estate is treated as converted into a tenancy in common, largely because it is believed this will solve some if not most of the difficulties which would otherwise arise in regard to it after a divorce. We do not feel justified, however, in altering the intention appearing in the deed itself, merely because difficulties will arise if we do not; especially since the conclusion we have reached will cause most if not all of them to disappear.

What then are the incidents of an estate by entireties? In answering this question, care must be taken not to confound the actual incidents of the estate,—namely, that the accruing income, while the grantees live, belongs in its entirety to each of the two and not to one exclusively, and the corpus passes to the survivor unaffected by anything which the decedent may have done,—with the results which flow therefrom, under the circumstances of particular cases.

Before the passage of the various statutes relating to the property of a married women, a husband who held with his wife an estate by entireties, had absolute control

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of it and its income, exactly as if he were the owner in fee; he could alien it and the purchaser would obtain an estate for the life of the husband and an absolute estate in remainder, if the latter survived his wife; if waste was committed he could sue in his own name and for his sole benefit, to recover for the resultant injury, even though the effect of the waste was to render practically valueless the property which would be the wife's if she survived him: *Fairchild v. Chastelleux*, 1 Pa. 176. This, however, was not an incident of the estate by entirety, but of the marital relation, and applied to the property of the wife, whether owned in fee simple or otherwise. All this was changed, however, by these acts, and though the estate by entirety remained as theretofore (*Diver v. Diver*, 56 Pa. 106; *Bramberry's Est.*, 156 Pa. 628; *Meyer's Est. (No. 1)*, 232 Pa. 89), a purchaser of the husband's interest acquired no right of possession during the wife's life, either alone or with her (*McCurdy v. Canning*, 64 Pa. 39; *Meyer's Est. (No. 1)*, 232 Pa. 89); neither husband nor wife could sell even the expectancy of survivorship, without the joinder of the other, nor could a valid title to the immediate interest or expectancy be obtained by a sheriff's sale or under proceedings in bankruptcy: *Beihl v. Martin*, 236 Pa. 519.

In view of those statutes (which were in force when the deed to plaintiff and defendant was made), who is entitled to the rent of a property held by entirety? Because of the unity of person and estate existing during marriage, either spouse may lease it and collect the rent; but this is so not because the right to do it is an incident of the estate, on the contrary it only flows from an incident thereof. While the marriage subsists it is a matter of indifference which of the parties leases the property or which of them obtains the rents; presumptively the moneys received will be expended for the benefit of both of them. The unity of the relation of the parties results in a unity of the estate; the leasing by either is for the

benefit of them in that relation, and the rents paid to either is to him or her in that relation only.

After a divorce, however, a different situation necessarily arises. If a fund consisting of the rents of such a property was before a court for distribution, as for instance if paid in by a tenant for years having an earlier title, or if collected by a receiver of the property,—appointed because of a threatened or actual deterioration thereof, growing out of disputes between the tenants by entireties or otherwise,—and no other equity intervened, the court would unhesitatingly divide the net rents between the former husband and wife in equal shares. So, also, if an agreement for an equal division had been made, as is alleged to have been the case here, and one of the parties endeavored to repudiate it, the courts would unquestionably enforce it. Yet in all such instances the parties would hold per tout just as they do where the fund is not before the court and the parties have made no agreement. These conclusions are permissible, because no incident of the estate is affected, hence the law is not violated, and equality of division effectuates the equity which has always been part of the common law of this State. The same reason calls for the enforcement of an equal division where, as here, each has an equal right to all the rent; under such circumstances the law will imply a promise, by the receiver of that which belongs equally to each, to give to the other his full proportion thereof. No legal principle compels the chancellor to wait until, by reason of the conflicting claims upon the tenant in possession, he is driven out, the rents are lost and the property is deteriorating in value, and possibly the claimants and their partisans are indulging in breaches of the peace in the endeavor to enforce their conflicting but equally meritorious claims. On the contrary, the gross inequity which necessarily results where one, having only an equal right with another, nevertheless takes all, and the not unreasonable probability of bodily harm being done and the public peace disturbed because the

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other endeavors to obtain her legal rights, is a potent warning that a conclusion which compels such injustice has error somewhere coiled in it. We have already pointed out what and where it is. Indeed it might as well be said that since each takes all for the benefit of both while the unity of person continues, when, after that unity is destroyed by the act of the law, one takes the entirety and denies all right in the other, an incident of the estate is destroyed, a result which this appellee strenuously argues cannot be allowed.

If it be suggested that the effect of the conclusion reached is to permit the creditors and alienees of one, without the consent of the other, to acquire an interest in the rents, though they could not do this while the grantees were husband and wife, and hence, after a divorce, they became for all practical purposes tenants in common so far as the rents are concerned, it is answered that the law is desirous for and not antagonistic to the payment of creditors, whether voluntarily or by legal proceedings, if this can be done without injuriously affecting other rights, as it may be after a divorce; and if it is imagined that other serious results may follow, it need only be added that doubtless an adequate remedy will be found for them when, if ever, they are shown to exist. Certainly no greater incongruity can arise than there would be now, if appellee's claim is sustained; for if he may take exclusive possession of the property and collect and keep all the rents for his own benefit, so also he may transfer them to a third party, either before or after they are paid, and thus, quoad the rents, the unity of interest will be destroyed.

A careful search of all our cases fails to disclose one which in any way antagonizes the above conclusion, unless it is Meyer's Est. (No. 2), 232 Pa. 95, 97, where it is said: "Being an estate by entirety neither husband nor wife could, under any circumstances, require an accounting by the other; nor could either restrain the other from consuming more than an equal part." In

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that case the question arose while husband and wife were both alive, married and living together, the attempt was to compel the wife to give security to a trustee in bankruptcy of the husband, before she would be permitted to enjoy the estate which she held in entirety, and it was decided, in accordance with all our later cases above referred to, that her right to its enjoyment could not be thus hampered. Limited to the facts of the case the quotation is unobjectionable; beyond that it must not be understood to go. "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision": *Cohens v. Virginia*, 6 Wheaton 264, 399-400, per MARSHALL, C. J. If this were not so, every dictum would become a binding precedent, which of course it is not.

The judgment of the Superior Court is reversed, and that of the Court of Common Pleas No. 4 of Philadelphia County is affirmed, and a procedendo is awarded.

A motion for a reargument of the above case was denied, as follows:

March 6, 1922, reargument refused; but the order heretofore made is amended, by consent of appellant, by adding at the end thereof, the words "the accounting therein ordered to begin as of the date of the divorce of appellant and appellee on December 18, 1917, but without prejudice to appellant's right to proceed for the balance of her claim."

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Syllabus—Statement of Facts.

Zimmerman v. Weinroth, Appellant.

Negligence—Damages—Evidence—Experts—Opinion—Disease result of injury—Loss of earning power.

1. When expert testimony is relied on to show the connection between an alleged cause and a certain result, it is not enough for the doctors to say simply that the ailment in question might have resulted from the assigned cause, or that the one could have brought about the other; they must go further and testify at least that, taking into consideration all the attending data, it is their professional opinion the result in question most probably came from the cause alleged.

2. Where it is equally probable that the disease resulted from two or more causes, for only one of which defendant is responsible, there can be no recovery.

3. The loss of earning power and its amount must appear by proper and satisfactory proof and not be left to conjecture.

4. Where a widow has not worked for wages for many years, but resided with her adult children, and kept house for them, it is reversible error for the court, in an action to recover damages for personal injuries to her, to submit to the jury the question of her loss of earning power, where there is no proof as to the value of the services which she did or could perform.

5. In such case, evidence that a daughter temporarily left her own employment to care for the mother and do the housework, and that the latter promised to pay the daughter wages she thereby lost, while proper as showing the mother's damages during that time, did not tend to establish her earning capacity, as the daughter's general employment was entirely different.

6. The mere fact that plaintiff was not a wage earner, prior to the accident, will not prevent her recovering for loss of earning power.

Argued January 5, 1922. Appeal, No. 31, Jan. T., 1922, by defendant, from judgment of C. P. No. 2, Phila. Co., Dec. T., 1919, No. 6153, on verdict for plaintiff, in case of Minnie Zimmerman v. Benjamin Weinroth. Before MOSCHZISKER, C. J., FRAZER, WALLING, SIMPSON, KEPHART, SADLER and SCHAFFER, JJ. Reversed.

Verdict—Opinion of the Court. [372 Pa.

Trespass for personal injuries. Before BARRATT, J.

The opinion of the Supreme Court states the facts.

Verdict and judgment for plaintiff for \$4,000. Defendant appealed.

Errors assigned were portions of charge (1) leaving to jury whether there was a causal connection between injury and disease, and (2) permitting jury to consider compensation for loss of earning power, quoting record.

Ralph B. Evans, of *Evans, Bayard & Frick*, for appellant.—The evidence was insufficient to connect the pneumonia with the accident: *Blasband v. Transit Co.*, 42 Pa. Superior Ct. 325; *Moss v. Transit Co.*, 42 Pa. Superior Ct. 466; *Dialesantro v. Phila. Co.*, 47 Pa. Superior Ct. 339; *Dumbluskey v. P. & R. C. & I. Co.*, 270 Pa. 22; *Miller v. Director Gen. Railroads*, 270 Pa. 330; *Fink v. Axle & Spring Co.*, 270 Pa. 476.

The jury should not have been permitted to consider loss of future earning power: *Frysinger v. Transit Co.*, 249 Pa. 555; *McGonnell v. Ry.*, 234 Pa. 396; *Kleine v. Rys.*, 252 Pa. 214.

Robert M. Bernstein, with him *Herman D. Levinson*, for appellee, cited: *Dickson v. Hollister*, 123 Pa. 421; *McCafferty v. R. R.*, 193 Pa. 339; *Dumbluskey v. P. & R. C. & I. Co.*, 270 Pa. 22; *Kleine v. Ry.*, 252 Pa. 214.

OPINION BY MR. JUSTICE WALLING, February 6, 1922:

This is an appeal by defendant from a judgment for plaintiff in an action for personal injuries. On January 2, 1920, plaintiff, while walking across Front Street, at Tioga Street, Philadelphia, was knocked down and hurt by defendant's automobile, under circumstances indicating the latter's liability for the injury thus inflicted. Plaintiff, a heavy woman, fifty-six years of age, was rolled along the street about twelve feet, sustaining injuries, including a fracture of two ribs. In about

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three days she developed pneumonia, which the evidence tends to show left her in a permanent state of partial disability. The experts called on behalf of plaintiff, including the attending physician, attributed the pneumonia to the accident, their testimony being, in effect, that the accident was the proximate predisposing cause of the pneumonia, while its immediate cause was the latent germs springing into activity by reason of plaintiff's weakened condition; in other words, that it was a case of traumatic pneumonia. The preponderance of medical testimony is that such disease may result from an injury; in fact, we held the evidence warranted that conclusion in *Dumbluskey v. P. & R. C. & I. Co.*, 270 Pa. 22. The quantum of evidence necessary to support such finding is stated by the Chief Justice, in *Fink v. Sheldon Axle & Spring Co.*, 270 Pa. 476, 479, that, "when expert testimony is relied on to show the connection between an alleged cause and a certain result, it is not enough for the doctors to say simply that the ailment in question might have resulted from the assigned cause, or that the one could have brought about the other; they must go further and testify at least that, taking into consideration all the attending data, it is their professional opinion the result in question most probably came from the cause alleged." In the present case, the opinion of plaintiff's experts came fully up to the rule as just quoted. True, defendant's experts were of a contrary opinion, but that made a question for the jury, to whom it was properly submitted. Of course, where it is equally probable that the disease resulted from two or more causes, for only one of which defendant is responsible, there can be no recovery (*Brugge-man v. York*, 254 Pa. 430, 435; *Miller v. Director Gen. of R. R.*, 270 Pa. 330), but whether this case came within that class was for the jury.

Plaintiff is a widow and resides in a home with her adult children, where, prior to the accident, she did the house work and was supported by them, but had not been

a wage earner since her marriage thirty-four years before. There was no proof as to the value of the services she did or could perform, yet the trial judge submitted to the jury the question of her loss of earning power; this was error, for it enabled the jury to base a verdict upon a mere guess or conjecture, which cannot be done: see *Peters v. Bessemer, etc., R. R. Co.*, 225 Pa. 307. The loss of earning power and its amount must appear by proper and satisfactory proof and not be left to mere conjecture: *Frysinger v. Phila. R. T. Co.*, 249 Pa. 555, 560. The value of such services as plaintiff performed prior to the accident, and of such as she could perform thereafter, was the subject of proof, without which no recovery for diminution thereof can be sustained (*Kost v. Ashland Borough*, 236 Pa. 164), for, before an allowance can be made for loss of earning power, it must be fairly proved: *Helmstetter v. Pitts. Rys. Co.*, 243 Pa. 422. "Earning power which is to be compensated in such cases must necessarily be the subject of substantive proof" (*Boguess v. Railroad Co.*, 234 Pa. 379, 390), without which it is error to submit that question to the jury: *McKenna v. Gas Co.*, 198 Pa. 31. While proof of the age, health and habits of the party injured is competent in such cases, yet standing alone it does not afford a sufficient basis upon which to rest a verdict. There is an exception, from necessity, where a child, too young to have earning capacity, is killed or injured: *O'Hanlon et al. v. Pittsburgh Rys. Co.*, 256 Pa. 394, 396, and cases there cited. In case of partial disability there must also be evidence to show to what extent plaintiff's earning capacity has been impaired: *Wallace v. Railroad Co.*, 195 Pa. 127. True, in the present case, plaintiff's daughter temporarily left her own employment to care for the mother and do the housework, and the latter promised to pay the daughter the wages she thereby lost. While this might be proper as showing plaintiff's damages during that time it did not tend to establish her

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earning capacity, as the daughter's general employment was entirely different.

The mere fact plaintiff was not a wage earner, prior to the accident, will not prevent her recovering for loss of earning power.

The judgment is reversed and a venire facias de novo awarded.

Pinter et al. v. James Baker, Inc., Appellant.

Negligence—Minors—Employment of minor—Certificate—Charge—Harmless error—Act of May 13, 1915, P. L. 286—Evidence inadmissible when offered—Age of minor—Fact of age—Ignorance of age—Appeal.

1. In an action by a minor under sixteen years of age brought by his father, and by the father in his own right, against the boy's employer, where the father admits knowledge of his son's employment in violation of the Act of May 13, 1915, P. L. 286, the defendant is entitled to binding instructions, so far as the individual claim of the father is concerned.

2. The court cannot be convicted of error for refusing a general offer of defendant to show that the minor plaintiff was sixteen when employed, where the record and notes of trial show that, at the time of the offer, the defense relied on was lack of knowledge of the boy's true age at the date of employment, and not the assertion that he was then over sixteen.

3. Evidence that the minor made a false statement of his age to defendant prior to his employment is inadmissible.

4. Where an objection to testimony is based on a reason, in itself good, according to the issues apparently involved, and the objection is sustained, the ruling will be affirmed on appeal though appellant may then call attention to grounds, other than those suggested when the ruling was made, which ordinarily would warrant the admission of the proofs tendered.

5. A suggestion made in a charge that a Pennsylvania employer must obtain a certificate under the Act of May 13, 1915, P. L. 286, for all youthful employees, whether under or over sixteen, whereas the obligation extends only to those under that age, is not ground

for reversal, where the jury were not told that the absence of the certificate made the defendant liable, and such instruction is therefore harmless error.

Practice, C. P.—Trial—Evidence—Demonstration by another person's wounded hand.

6. Refusal of the trial judge to permit the injured hand of a third person to be used before the jury, for purposes of demonstration, during the examination of a witness for defendant, is a matter within the control of the court below, and is not ground for reversal, where the appellate court is not convinced of an abuse of discretion.

Argued January 6, 1922. Appeals, Nos. 43 and 44, Jan. T., 1922, by defendant, from judgment of C. P. No. 2, Phila. Co., June T., 1920, No. 6824, on verdict for plaintiff, in case of Charles Pinter, by his father and next friend, Andrew Pinter, and Andrew Pinter, in his own right, v. James Barker, Inc. Before MOSCHZISKE, C. J., FRAZER, WALLING, SIMPSON, KEPHART, SADLER and SCHAFFER, JJ. Reversed in part.

Trespass for personal injuries. Before ROGERS, J.

The opinion of the Supreme Court states the facts.

Verdict and judgment for Andrew Pinter for \$2,000, and for Charles Pinter for \$6,000. Defendant appealed.

Errors assigned were rulings on testimony and instructions appearing by the opinion of the Supreme Court, quoting record.

Ralph B. Evans, of *Evans, Bayard & Frick*, for appellant.—The court erred in excluding evidence of declarations by the minor as to age.

The father having acquiesced in the minor's employment, was not entitled to recover: *McCool v. Coal Co.*, 150 Pa. 638; *Raab v. Coal Co.*, 64 Pitts. L. J. 284.

John P. Connelly, for appellee.—The terms of the statute cannot be waived by the contracting parties: *Valjago v. Steel Co.*, 226 Pa. 515; *Krutlies v. Coal Co.*, 249 Pa. 162.

Nor does a misstatement of age by the minor relieve defendant of the burden of ascertaining as required by the act: *Hrabchak v. Canal Co.*, 54 Pa. Superior Ct. 626.

And one who employs a minor in violation of the statute does so at his own risk and will be liable in damages for injuries, if sustained: *Lenahan v. Coal Mining Co.*, 218 Pa. 311.

The proximate cause of the injuries was the employment of the boy in violation of the act: *Stehle v. Machine Co.*, 225 Pa. 348.

OPINION BY MR. CHIEF JUSTICE MOSCHZISKER, February, 6, 1922:

There are two plaintiffs in this case, Andrew Pinter, who sued to recover damages suffered by him through physical injuries alleged to have been negligently inflicted by defendant corporation upon his minor son Charles, and the latter, who, by his "father and next friend," sought damages on his own behalf. Verdicts were rendered in favor of both plaintiffs; defendant has appealed from judgments thereon.

The assignments of error, so far as they question the father's claim, must be sustained.

The Act of May 13, 1915, P. L. 286, known as the Child Labor Law, pleaded by plaintiffs, provides, by section 3, that, in "establishments" such as comprehended by the statute, "it shall be unlawful for any person to employ any minor between fourteen and sixteen years of age, unless such minor shall, during the period of such employment, attend.....school" for a certain number of hours each week; and by section 4, that "no [such] minor shall be permitted to work.....for more than fifty-one hours in any one week, or more than nine hours in any one day, or before six o'clock in the morning, or after eight o'clock in the evening, of any day."

The minor was a little under sixteen years of age at the time of the injury, and the testimony shows plain admissions by the father, first, that he knew his son's

age, next, that the boy, while in the employ of defendant, each day went to work at half past five p. m., and did not quit until "five or after" on the following morning, and, finally, that this child did not attend school at all during the time of his employment with defendant. In short, the father acquiesced in his minor son's unlawful employment by defendant, and hence was in *pari delicto* with the latter and cannot recover: *McCool v. Lucas Coal Co.*, 150 Pa. 638, 642; *Rapaport v. Pittsburgh Rys. Co.*, 247 Pa. 347, 351; *Darbrinsky v. Penna. Co.*, 248 Pa. 503, 509. The controlling principle is well stated in *Lee v. New River, etc., Coal Co.*, 203 Fed. 644, 647; see also *Daniels v. Thacker Fuel Co.*, 79 W. Va. 255, 259; *Hetzel v. Wasson, etc., Co.*, 89 N. J. L. 205, 207. The point here involved does not appear to have been squarely raised in *Stehle v. Jaeger, etc., Machine Co.*, 225 Pa. 348, 353, depended on by Andrew Pinter, appellee.

The court below told the jury, as a matter of law, the father could not recover if he had knowledge of his son's illegal employment, but it overlooked the controlling circumstance that, as a matter of fact, Andrew Pinter had admitted such knowledge, and, therefore, defendant was entitled to binding instructions, so far as the individual claim of the father is concerned; to that extent, the assignments of error complaining of the absence of those instructions and of the refusal of judgment *n. o. v.* are sustained.

We shall now consider the claim of the minor plaintiff. Charles Pinter was called as a witness for his father, as well as for himself, and testified that, at the time of the accident, he was not quite sixteen; he was not cross-examined in any manner on the point of his age. Andrew Pinter, the father, also said his son, Charles, was less than sixteen when employed by defendant, and was not cross-examined on this subject. The boy's mother likewise swore to his age, without being cross-examined on that part of her testimony. Upon the production of defendant's case, however, three endeavors were made to

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prove that, when Charles was hired, he was asked concerning his age and stated it to be seventeen; but, on objection of plaintiffs, the testimony was disallowed. Appellant contends the age of the injured boy was a controlling issue, and that the testimony in question should have been received. This would undoubtedly be true, if the age had been urged as such an issue (*Kreiter v. Bomberger*, 82 Pa. 59, 61), but as a matter of fact that was not the case; therefore the point we have to determine is, Was reversible error committed in rejecting the testimony, under the circumstances attending its offer?

Before taking up this main point, we state, incidentally, that the question as to whether the boy was under or over sixteen at the time of the accident was submitted to the jury, and found in favor of plaintiffs, i. e., that he was under sixteen at the time of the accident; we also suggest that, even had Charles's alleged declaration as to his age been accepted in evidence, it is unbelievable that the jury would have found him seventeen years old when taken into the employ of defendant, in the face of the preponderating evidence to the contrary, already recited, and of the official birth certificate from the Division of Vital Statistics of the Bureau of Health, introduced by plaintiffs, which showed the boy to be under sixteen at the date in question; but, passing these considerations, we do not feel called upon to reverse the judgment on the verdict in the boy's favor, for other reasons which we shall now state.

The official notes of the trial make it quite plain that, up to the tender of the rejected testimony, which we are here discussing, the defense was not that Charles had, as a matter of fact, passed sixteen, but that his employer did not know he was of a less age. This is demonstrated by the testimony of the man who engaged the minor, and the colloquy between the trial judge and counsel at the time of the rulings at present under consideration.

When the witness just mentioned was asked about defendant's alleged breach of law, in employing Charles, he did not deny, but sought to excuse, the violation by answering, "I didn't know this boy was under sixteen"; it will be observed, this answer plainly indicates the defense to be lack of knowledge of the minor's true age at the time he was employed, and not an assertion that, in point of fact, he was then over sixteen. In addition, the colloquy before referred to (which the assignments of error do not show in full) strongly indicates that, when the rulings complained of were made, the trial judge had the first-mentioned defense in mind, which idea is reinforced by his remark to counsel for plaintiff, when the latter was taking exceptions to the charge, to the effect that he, the judge, did not understand there was any question as to the actual age of the boy,—this conception of the defense having been expressed previously in the charge itself. Moreover, in determining what appeared as the defense at the time of the rulings,—and, therefore, what appeared as the defense in passing on the relevancy of the testimony offered, with the scope of the objection thereto,—consideration may be given to the fact that, when Charles Pinter was on the stand, no attempt was made to lay ground, by cross-examination, for the introduction of the evidence here in question, nor at the time of these rulings had such defense been brought out on the cross-examination of any of plaintiffs' witnesses or otherwise suggested.

All of the facts and circumstances above noted strongly indicate that, when the rulings now complained of were made, the defense appeared to be, not that the minor was over sixteen years of age, but that, at the time of his employment, defendant had been deceived into the belief he was over sixteen; and, since both the court and counsel on each side must have understood that this was the fact intended to be shown by the evidence in question, we shall consider the rulings before us as though based

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on objections to such a tender, and view the record accordingly.

The defense sought to be proved,—that prior to the minor's employment he had made a false statement, concerning his age, to a representative of defendant,—was unavailing in law (*Krutlies v. Bulls Head Coal Company*, 249 Pa. 162, 169; see also *Stehle v. Jaeger, etc., Machine Co.*, 225 Pa. 348, 354); offers of evidence to establish such a defense were therefore irrelevant, and the boy's pre-trial assertions, as to his age, being tendered for that purpose, were properly refused, upon plaintiffs' objections thereto.

The relevant governing rule is this: When an objection to testimony is based on a reason, in itself good, according to the issues apparently involved, and the objection is sustained, the ruling will be affirmed on appeal even though appellant may then call attention to grounds, other than those suggested when the ruling was made, which ordinarily would warrant the admission of the proofs tendered. Under such circumstances, the appellate court will say, "Since all the intimations on the record point to quite another contention, you should have made plain to the trial judge what you now allege as the issue sought to be proved, and the grounds you now depend on should have been called to his attention when he made the ruling of which you complain." The underlying principle is that the object for which a particular piece of evidence is submitted should be kept steadily in view, when considering a complaint as to its admission or rejection, and complainant must be confined to that object; the relevancy of the evidence, had it been offered generally, need not be affirmed or denied, because a party cannot offer evidence apparently for one purpose, and complain, when it has been rejected, that it was legitimate for some other: *Gaines v. Com.*, 50 Pa. 319, 326.

Another ruling of which appellant complains is the refusal of the trial judge to permit the injured hand of

a third party to be used, before the jury, for purposes of demonstration, during the examination of one of defendant's witnesses; this was a matter within the control of the court below, and we are not convinced of an abuse of discretion.

Any harm which might have been done by the trial judge's reference to the statement of claim, as showing the age of Charles Pinter to be less than sixteen years, was immediately remedied when the court's attention was called to the matter; we see no merit in the assignment as to this incident.

The Act of 1915, *supra*, ordains that no child under fourteen years of age shall be put to work, and those between fourteen and sixteen shall not be employed unless the certificate there provided for is furnished. The trial judge, when charging the jury, said, *inter alia*, "We instruct you, under the law of Pennsylvania, as we understand it, that it is the duty of an employer to obtain a certificate of age from his employees who are youthful, stating they are over the age of sixteen years, and, according to the evidence in this case, this was not done by the defendant." Appellant complains of this excerpt from the charge, that it does not present a correct statement of law. The suggestion is there made that a Pennsylvania employer must obtain a certificate for all youthful employees, whether under or over sixteen, whereas the obligation extends only to those who are less than the stated age; but, since the jury were not told that the absence of the certificate made defendant liable to plaintiff, we do not feel warranted, under all the attending circumstances, in treating this mistaken instruction as reversible error.

All assignments calling for discussion have been referred to, and we accordingly enter the following order:

The judgment on the claim of the plaintiff, Andrew Pinter, is reversed and here entered for defendant; the judgment on the claim of Charles Pinter is affirmed.

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Syllabus—Arguments.

Commonwealth v. Priest, Appellant.

Criminal law—Murder—Evidence—Duty of appellate court to review the evidence—Act of Feb. 15, 1870, P. L. 15.

1. Under the Act of February 15, 1870, P. L. 15, it is the duty of the Supreme Court, on an appeal from a conviction of murder, to review both the law and the evidence, and determine whether the ingredients necessary to constitute first degree murder have been proved to exist.

2. If there is competent evidence to support the verdict, the appellate court cannot usurp the functions of the jury and reverse merely because it might be contended they should not have believed the witnesses produced on behalf of the Commonwealth.

3. The evidence in this case examined and held to be sufficient to sustain a conviction of murder of the first degree.

Argued January 4, 1922. Appeal, No. 466, Jan. T., 1921, by defendant, from judgment of O. & T., Phila. Co., Sept. T., 1920, Nos. 453-4, on verdict of murder of the first degree, in case of Commonwealth v. James Priest. Before MOSCHZISKER, C. J., FRAZER, WALLING, SIMPSON, KEPHART, SADLER and SCHAFFER, JJ. Affirmed.

Indictment for murder. Before McCULLEN, J.

The opinion of the Supreme Court states the facts.

Verdict of guilty of murder of the first degree, upon which sentence was passed. Defendant appealed.

Errors assigned were (1) that "competent evidence did not warrant a conviction of murder of the first degree," and (2) refusal of new trial, quoting record.

Joseph L. McAleer, with him *C. Stuart Patterson, Jr.*, for appellant, cited: *Com. v. Morrison*, 193 Pa. 613; *McCue v. Com.*, 78 Pa. 185; *Com. v. DeMasi*, 234 Pa. 570.

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Charles F. Kelly, Assistant District Attorney, with him *Samuel P. Rotan*, District Attorney, for Commonwealth, cited: *Com. v. Diaco*, 268 Pa. 305; *Com. v. Byrd*, 269 Pa. 179.

OPINION BY MR. JUSTICE FRAZER, February 6, 1922:

Defendant was convicted of murder of the first degree. A motion for a new trial was refused by the court below and the sole question raised on this appeal is whether there was competent evidence to sustain the verdict. Under the Act of February 15, 1870, P. L. 15, it is our duty to review both the law and the evidence and determine whether the ingredients necessary to constitute first degree murder have been proved. If there is competent evidence to support the verdict we cannot usurp the function of the jury and reverse merely because it might be contended they should not have believed the witnesses produced on behalf of the Commonwealth: *Com. v. Danz*, 211 Pa. 507, 512; *Com. v. Diaco*, 268 Pa. 305.

It appears from the evidence that defendant and his wife had domestic differences culminating in the latter leaving her home and going to that of neighboring friends, taking with her their youngest child, a baby seven months old. On discovering her whereabouts defendant called at the neighbor's house and endeavored to induce his wife to return to their home; in reply to his request she reminded him of his cruel treatment of her, the physical injury she had sustained at his hands, the threats he had made to kill her if she remained with him, finally stating she could live with him no longer. To which he replied "That's all right, I am a beast" and left the house. The wife's assertion as to receiving cruel treatment at the hands of her husband was corroborated by witnesses, who testified as to seeing marks of violence upon her person. Several days later he returned to the neighbor's house where his wife was staying and finding the front vestibule door open entered, passing through

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the hallway and dining room to the kitchen where his wife was seated at a table nursing the baby, and, without giving a word of warning, shot her in the back, once as she sat in the chair, her back being toward him and she not being aware of his presence, and again after she had fallen to the floor, causing her death. A third shot missed her. These circumstances were described by three witnesses who were in the room at the time. One of the men present seized defendant and a struggle ensued during which two additional shots were fired, one striking the person who was endeavoring to obtain possession of the revolver. The evidence indicates defendant acted deliberately and with a preconceived intent to kill. It was also testified that as defendant entered the kitchen and fired the first shot "he had a smile on his face." The charge of the trial court was fair and impartial, the rights of defendant were carefully guarded and the evidence ample to support the verdict.

The judgment is affirmed and the record remitted for the purpose of execution.

Commonwealth v. Carter, Appellant.

Criminal law—Murder—New trial—After-discovered evidence—Credibility of witness—Act of April 22, 1903, P. L. 245.

1. Where, after a conviction of murder of the first degree, a motion for a new trial is filed, and defendant is given fifteen days to file affidavits and depositions in support of his motion, which he fails to do, and seven weeks later a new trial is refused, defendant is not entitled to a rehearing in the absence of any explanation of his failure to take advantage of the previous opportunity given him.

2. After-discovered evidence having for its purpose only the impeachment of the credibility of witnesses, furnishes no sufficient reason for a new trial.

3. Where there is positive evidence that the deceased was shot with a revolver containing shells of a certain size, and that the revolver was wrenched from defendant at the time, after-discovered

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evidence that defendant also possessed other and larger shells, is insufficient upon which to base an application for a new trial.

4. In such case the Supreme Court will not enter an order for additional inquiry by the court below as provided by the Act of April 22, 1903, P. L. 245, even if a petition had been presented to the Supreme Court in the manner provided by the act, which was not done.

Argued January 4, 1922. Appeal, No. 467, Jan. T., 1921, by defendant, from judgment of O. & T. Phila. Co., Sept. T., 1920, No. 541, on verdict of murder of the first degree, in case of Commonwealth v. Earl Carter, alias Earl French. Before MOSCHZISKEB, C. J., FRAZER, WALLING, SIMPSON, KEPHART and SADLER, JJ. Affirmed.

Indictment for murder. Before McCULLEN, J.

The opinion of the Supreme Court states the facts

Verdict of guilty of murder of the first degree, upon which sentence was passed. Defendant appealed.

Errors assigned appear by opinion of Supreme Court, quoting record.

Frederick F. Windle, for appellant, cited: Act April 22, 1903, section 1, P. L. 245.

Maurice J. Speiser, Assistant District Attorney, and *Samuel P. Rotan*, District Attorney, with them, *Franklin E. Barr*, for appellee, cited: Com. v. Williams, 2 Ashmead 68; Com. v. Flanagan, 7 W. & S. 415.

OPINION BY MR. JUSTICE SADLER, February 6, 1922:

Earl Carter was convicted of the murder of Richard Manus, and, a new trial having been refused, he was sentenced as required by law. From the judgment entered, an appeal has been taken, in which no complaint is made of the conduct of the trial or the charge of the court. The testimony discloses all of the ingredients

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necessary to the rendition of a verdict of murder of the first degree, and, if believed, fully justifies the finding made. Unless some harm has been done the defendant by the refusal to grant a new trial on the ground of after-discovered evidence, the action taken below must be upheld.

The deceased conducted a small store in the City of Philadelphia, and the defendant, residing near by, had been an occasional customer. On June 17, 1920, he was a purchaser early in the day, and was present again about six in the evening. At that time Mrs. Manus came from the apartment at the rear to wait upon the supposed patrons. When she entered the storeroom, two men confronted her and demanded delivery of the cash. One, whom she identifies as Carter, armed with a revolver, secured the money upon her person, as well as from the cash register, and handed it to the accomplice, who fled, and has not been apprehended. For the apparent purpose of causing fright, and inducing silence, defendant then fired, the bullet striking the arm of Mrs. Manus. The husband, attracted by the noise, advanced from the rear portion of the house, was attacked by the robber, and shot once. Holding each other, Carter and Manus struggled through the door to the street, where three additional shots were fired, one into the air and two into the body of deceased. Neighbors seized the defendant, taking away the revolver, which he still held, and in so doing a slight injury was inflicted upon one of his fingers. The actions of the parties, after reaching the highway, were described by many witnesses, all of whom identified Carter as the assailant, while the widow and defendant alone testified to the happenings within the store. At the hospital, shortly before death, Manus recognized and pointed out the defendant as the murderer.

The defense rested on the assertion that Carter was present in the store, by chance, at the time of the hold-up, and took no part in the robbery. It was insisted

the assault was the act of the second customer, and the seizing of deceased, when he backed from the store to the street, was explained as resulting from an effort of defendant to aid the wounded man and prevent his falling. Certain exclamations, alleged to have been made by Carter at the moment, were offered to substantiate this contention. The jury refused to credit the story, and conviction followed.

Assignments of error now presented complain of the refusal to award a new trial. An affidavit, submitted below, averred that certain evidence had come to the notice of counsel, which, taken in connection with the other testimony offered, was sufficient to raise a reasonable doubt of guilt in the minds of a jury. It was claimed, first, that the police officials found, in the room of defendant, cartridges of a calibre differing from those used in defendant's gun, which fact had not been disclosed on the trial; second, that certain identification marks had been placed upon the revolver, as to which no explanation was given the jury; third, that the widow denied at the trial that she knew the alleged accomplice of Carter, whereas she had stated previously he was Alexander Miller; and, fourth, that an examination of the finger of defendant, made at the station house by the police, showed the injury caused by the trigger of the gun was on the left hand instead of the right, as had been testified.

Leave was given to file, within fifteen days, affidavits and depositions in support of the motion. None was submitted, and, on April 28th, more than seven weeks later, a new trial was refused; whereupon, defendant, by his counsel, asked for a rehearing in order that the newly found evidence might be placed upon the record for consideration. The refusal of this application was proper, in the absence of some explanation of the failure to take advantage of the previous opportunity given. The correctness of the conclusion reached need not be based, however, on any technical ground. Assuming

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that all of the suggestions are amply supported by proof, there is nothing to be found therein which could have affected the merits of the case. If Mrs. Manus made the statement that she knew the second man, which she denied on the stand, or, if Scully was in error as to the finger which was injured by the falling trigger of the gun, whether on the right or left hand, the contradiction would have been effective only to impeach the credibility of the witness testifying. After-discovered evidence, having this purpose only, furnishes no sufficient reason for granting a new trial: *Com. v. Flanagan*, 7 W. & S. 415.

Nor can we see that the Commonwealth was bound to offer explanation of the identification marks upon the gun. Had such course been deemed necessary, there is no reason why it should not have been demanded during the course of the trial. The defendant himself called attention to them at that time; if considered of importance, the matter should then have been made the subject of investigation. So, also, failure to show that bullets were found in defendant's room of a calibre differing from that of the gun used is no sufficient reason for a new hearing. In the face of the positive testimony that deceased was shot with a revolver containing shells of a certain size, which was wrenched from the hand of defendant, when the assault was completed, it cannot be said he was prejudiced by failure to prove the immaterial fact that he was also possessed of other and larger cartridges: *Cf. Com. v. Morrison*, 193 Pa. 613.

None of the evidence would have justified the court below in awarding a new trial, even if established by proper proofs. It is now suggested that the application made be treated here as if instituted under the Act of April 22, 1903, P. L. 245, which gives authority to this court to order further investigation by the trial tribunal where newly discovered facts are shown, sufficient to raise a doubt as to the guilt of a defendant convicted of murder of the first degree. It is enough to say that the

matter has not been presented to us in the manner provided by that legislation; if the contrary was true, the facts disclosed are not such as would justify an order for additional inquiry by the court below: Cf. *Com. v. Hine*, 213 Pa. 97. The reasons for so declaring are apparent from the discussion which has here preceded.

The assignments of error are all overruled; the judgment and sentence of the court below is affirmed, and the record is remitted for the purpose of execution.

Piacentino v. Young, Appellant.

Equity—Specific performance—Time—Essence of contract—Waiver—Agreement as to new time of settlement—Tender.

1. Specific performance of a contract for the sale of real estate, where time is of the essence of the contract, will not be enforced if there has been a failure of the vendee to comply with the obligation assumed within the time limit.

2. This rule is subject to the limitation that the parties may by their actions surrender the right to demand strict compliance.

3. If this right has been waived, and a new time fixed, the vendee may perform, or offer to do so, until the expiration of the new date.

4. Where one additional day has been allowed by the vendor, he cannot withdraw until the end of that day. If he does so he will be in default, and the vendee no longer needs to make a strict legal tender. All that will be required of him thereafter is proof of a readiness and willingness to perform.

5. If the vendor has named a depository, the vendee has fully performed, if he has paid what was due, to the depository.

Equity—Equity practice—Findings of fact—Findings of chancellor reversed by court in banc—Participation of chancellor in final findings—Appeal.

6. The findings of fact by a chancellor will not be reversed on appeal where based on sufficient competent evidence, and no manifest error appears.

7. If the court in banc reverses the chancellor, and the chancellor takes part in the hearing on exceptions to his findings, and joins the court in changing his previous findings, the final conclu-

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Syllabus—Arguments.

sion of the chancellor is to be treated as his deliberate conclusion, and such findings are subject to the general rule on appeal.

Argued January 4, 1922. Appeal, No. 7, Jan. T., 1922, by plaintiff, from decree of C. P. No. 5, Phila. Co., Dec. T., 1918, No. 5111, on bill in equity, in case of Louis Piacentino v. George W. Young. Before MOSCHIZSKER, C. J., FRAZER, WALLING, SIMPSON, KEPHART and SADLER, JJ. Affirmed.

Bill in equity for specific performance.

Exceptions to findings of MARTIN, P. J.

The court in banc, MARTIN, P. J., participating, sustained the exceptions, and entered a decree for plaintiff, MONAGHAN, J., filing the opinion. Defendant appealed.

Error assigned, among others, was decree, quoting it.

Owen J. Roberts, with him *Albert W. Sanson*, for appellant.—From an examination of the testimony there was ample evidence to support all of the findings of fact of the learned trial judge and there was nothing at all to warrant the reversal of these findings by the learned judge who filed the opinion sustaining the exceptions filed on behalf of plaintiff: *MacDougall v. Bank*, 265 Pa. 170; *Mansfield v. Redding*, 269 Pa. 357; *McIlvaine v. Powers*, 270 Pa. 341.

Defendant, under no circumstances, is bound to forever continue to hold the property to await the offer and convenience of the purchaser: *Sanders v. Brock*, 230 Pa. 609.

The fact that defendant extended the time for settlement to a definite fixed period is not a waiver of his right to insist upon settlement on the day fixed: *Shilanski v. Farrell*, 57 Pa. Superior Ct. 137; *Sgarlat v. Diggory*, 68 Pa. Superior Ct. 53; *Rugg v. Realty Co.*, 261 Pa. 453.

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Equity does not abhor forfeitures and penalties, where time is of the essence of the contract, but will follow the law and will enforce a covenant of forfeiture as essential to do justice: *Brown v. Vandergrift*, 80 Pa. 142; *Axford v. Thomas*, 160 Pa. 8.

William A. Carr, with him *Edward W. Wells* and *Sidney L. Krauss*, for appellee.

OPINION BY MR. JUSTICE SADLER, February 6, 1922:

Piacentino entered into three contracts with Young, by which he agreed to buy five properties. In each instance, settlement was provided for within ninety days, but the transactions were not completed within the time fixed. After the expiration of the period determined upon, the purchase price of one house was paid, and the title transferred. As to the others, settlements were postponed by agreement, shown either by express words or conduct, until January 30, 1919. On that day, the parties met in the office of a trust company to close the negotiations. The necessary calculations were made, and the balance due by the vendee was found, the correctness being certified to by the signature of the vendor to the account prepared. It then appeared that the check of a building and loan association for \$5,000, being the amount which it had agreed to advance Piacentino upon mortgages of two of the houses, was not in hand, and could not be obtained until the next day. After discussion, in which the defendant demurred to further delay, on account of loss of interest on certain mortgages upon which he was liable, the vendee deposited with the trust officer a sum more than sufficient to cover the charges for twenty-four hours. Young left the executed deed, but, finding upon his return the following morning that the balance had not been paid in, withdrew it about noon. Shortly after three, the remainder of the purchase price was handed to the trust company, and notice of this fact was attempted to be given Young.

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Thereafter, the vendor declined to deliver the conveyance, insisting that the time for settlement had not been extended beyond the 30th, and, further, a rescission had been agreed to by the parties on the morning of the 31st, and the deal called off. The result of the dispute was the present bill asking for specific performance, which was subsequently decreed; from the order made this appeal is taken.

The legal questions here involved are without difficulty. Specific performance of a contract for the sale of real estate, where time is of the essence of the contract, will not be enforced if there has been a failure of the vendee to comply with the obligation assumed within the period limited: *Doughty v. Cooney*, 266 Pa. 337; *McKuen v. Serody*, 269 Pa. 284. This rule is subject to the qualification that the parties may by their actions surrender the right to demand strict compliance. In *Vankirk v. Patterson*, 201 Pa. 90, 95, quoting with approval from *Pomeroy on Contracts*, the principle is thus stated: "Wherever time is made essential, either by the nature of the subject-matter and object of the agreement, or by express stipulation, or by a subsequent notice given by one of the parties to the other, the party in whose favor this quality exists—that is, the one who is entitled to insist upon a punctual performance by the other, or else that the agreement be ended—may waive his right and the benefit of any objection which he might raise to a performance after the prescribed time, either expressly or by his conduct; and his conduct will operate as a waiver when it is consistent only with a purpose on his part to regard the contract as still subsisting and not ended by the other party's default." Where such conditions appear, the vendee may perform, or offer to do so, until the expiration of the new date stipulated: *Mansfield v. Redding*, 269 Pa. 357.

The application of the decisions to the present controversy depends upon the determination of the facts, the real cause of contention here. Did it appear that the

time for settlement had been extended until the 31st of January, 1919, and was the performance tendered on that day by Piacentino sufficient? And, again, was there a mutual rescission of the contract of sale? Both of these queries have been answered adversely to the defendant by the court below sitting in banc. In reviewing the conclusions reached by a chancellor, we are to be guided by the oft-declared principle that facts found which involve the credibility of witnesses, and the weight to be given to their declarations, will be treated by this court as if passed upon by a jury, where there is testimony to support them: *Cruzan v. Cruzan*, 243 Pa. 165; *McIlvaine v. Powers*, 270 Pa. 342. Only in cases of plain mistake will they be set aside, if any evidence justifies the determination adopted: *McConville v. Ingham*, 268 Pa. 507. It is insisted, however, that the appellant should not be so controlled in the present controversy, for the reason that the trial judge, who conducted the hearing, first found there was no extension of the time for the performance of the agreement beyond January 30th, a conclusion subsequently set aside by the court in banc, after argument upon exceptions filed. There would be merit in this contention if the chancellor found one way, and the court as a whole, before whom the witnesses did not appear, took a different view. But this is not the situation here presented, where the former took part in the subsequent hearing, and joined in changing his previous finding. It is the final conclusion of the chancellor which is to be considered. Frequently he modifies the facts as first declared, where mistake is called to his attention, and the last statement made is to be treated as his deliberate conclusion.

With these thoughts in mind, the record has been examined to discover if the findings adopted ultimately are justified by the evidence produced, and we are convinced that the proper determinations have been reached. Though denied by Young, there is positive testimony, supported by convincing circumstances, that the time for

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settlement was extended until the 31st, and there was no mutual rescission of the contract on that morning. If this was so, the vendor could not withdraw the executed deed from the trust company at noon; he was bound to afford opportunity for settlement until the period fixed had gone by. The payment made by the vendee to the agent of both the parties about three o'clock was sufficient. Indeed, by that time the vendor was in default, and a strict legal tender to him was no longer necessary,—all that would have been required thereafter was proof of a readiness and willingness to perform. Young was not entitled to a personal delivery of the consideration, as he had designated the depository, and when the vendee paid the balance there, his obligation was performed. It was the duty of the vendor to deliver the deed; having failed, the decree requiring that he do so was properly entered. It follows from what has been said that the assignments of error should be overruled, and it is so ordered.

The decree of the court below is affirmed at the cost of the appellant.

Meaker Galvanizing Co. v. Charles E. McInnes & Co., Inc., Appellant.

Accord and satisfaction—Performance—Agreement to accept promise in satisfaction—Consideration—Written evidence—Law for court.

1. In an accord and satisfaction, the performance generally is the carrying out of an agreement of accord, but it may be expressly agreed, or the circumstances may clearly show, that the promise or agreement of accord itself is to be taken in satisfaction of the original demand, and, when that is the case, the promise or undertaking, if supported by a sufficient consideration, is to be accepted as equivalent to performance or execution.

2. An adjustment of unliquidated damages is a sufficient consideration for the promise.

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3. Where there is no conflict in the facts, and the determination of the intention of the parties as to the accord, rests solely on the interpretation to be placed on their letters, the question is one of law for the court.

Practice, C. P.—Affidavit of defense—Fraud—Insufficient averment.

4. An affidavit of defense averring fraud is evasive and insufficient, if it does not aver facts showing the extent of the fraud or misrepresentations averred.

Practice, C. P.—Statement—Foreign corporation—Registration—Doing business—Presumption of legality—Affidavit of defense.

5. A foreign corporation may ordinarily maintain an action to enforce its contracts, within the State. It is restricted only when "doing business" within the meaning of the Pennsylvania registration law, and it has failed to register.

6. No presumption arises that a foreign corporation in bringing a suit in this State, is a wrongdoer, and has failed to perform its legal obligation of registering.

7. It need not in its statement of claim negative its violation of a penal statute.

8. Where, in such case, the statement of claim shows a Pennsylvania contract, and that the transaction involved interstate commerce, but does not show that the company plaintiff was "doing business" within the meaning of the registration laws, an affidavit of defense is insufficient which makes no proper averments to indicate the necessity of registration.

9. The mere averment that the corporation was doing business within the Commonwealth is not enough; facts must be set forth from which such conclusion can be drawn.

Argued January 5, 1922. Appeal, No. 26, Jan. T., 1922, by defendant, from order of C. P. No. 4, Phila. Co., Dec. T., 1920, No. 5140, making absolute rule for judgment for want of sufficient affidavit of defense, in case of Meaker Galvanizing Co. v. Charles E. McInnes & Co., Inc. Before MOSCHZISKER, C. J., FRAZER, WALLING, SIMPSON, KEPHART, SADLER and SCHAEFFER, JJ. Affirmed.

Assumpsit for breach of contract.

Rule for judgment for want of sufficient affidavit of defense. Before FINLETTER, J.

The opinion of the Supreme Court states the facts.

Rule absolute. Defendant appealed.

Error assigned, inter alia, was order, quoting it.

Horace M. Rumsey, with him *Hiram B. Calkins*, for appellant.—The statement of claim is not sufficient as to right of plaintiff as a foreign corporation to bring this suit: *Phoenix Silk Mfg. Co. v. Reilly*, 187 Pa. 526.

The parties in this cause entered into an accord and not a compromise agreement: *Flegal v. Hoover*, 156 Pa. 276; *Foye v. Coal & Coke Co.*, 251 Pa. 409.

The accord in the case at bar is executory: *Hosler v. Hursh*, 151 Pa. 415; *Schwartzfager v. Ry.*, 238 Pa. 158.

An unexecuted accord is unenforceable: *Hearn v. Kiehl*, 38 Pa. 149; *Foye v. Coal & Coke Co.*, 251 Pa. 409; *Schwartzfager v. Ry.*, 238 Pa. 158; *Shoemaker v. Fegley*, 14 Pa. Dist. R. 850.

The agreement of accord in this case is unenforceable as it is not founded on a valuable consideration: *Martin v. Frantz*, 127 Pa. 389; *Keen v. Vaughan*, 48 Pa. 477; *Thomas v. Beneficial Union*, 260 Pa. 1.

The averments in the affidavit of defense as to false and fraudulent representations are sufficient, assuming a good cause of action is set forth in the statement of claim: *Hoge v. Hoge*, 1 Watts 163; *Williams v. Kerr*, 152 Pa. 560; *Sutton v. Morgan*, 158 Pa. 204; *Standard Interlock Elevator Co. v. Wilson*, 218 Pa. 280; *Smith v. Smith*, 166 Pa. 563.

Roland C. Heisler, with him *Dickson, Beitler & McCouch*, for appellee.—The transaction between the parties being interstate commerce, the acts requiring registration of foreign corporations have no application: *Mearshon & Co. v. Lumber Co.*, 187 Pa. 12; *Wolff Dryer Co. v. Bigler & Co.*, 192 Pa. 466; *Blakeslee Mfg. Co. v.*

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Hilton, 5 Pa. Superior Ct. 184; Federal Glass Co. v. Lorentz, 49 Pa. Superior Ct. 585; Blue Valley Creamery Co. v. Zimmerman, 60 Pa. Superior Ct. 278; Stein & Samson v. Slomkowski, 74 Pa. Superior Ct. 156.

An agreement on which action was brought is a binding compromise agreement: Hosler v. Hursh, 151 Pa. 415.

The intention of the parties was to substitute the new agreement in satisfaction of the old: Zentmyer v. Zentmyer, 69 Pa. Superior Ct. 496; Flegel v. Hoover, 156 Pa. 276.

OPINION BY MR. JUSTICE SADLER, February 6, 1922:

Defendant purchased certain galvanizing equipment from plaintiff, with directions that the various parts be assembled and forwarded to a customer of the former in Bombay, India. The foreign consignee named was unable to establish proper financial credits, whereupon the vendor was requested to cancel the order. This it declined to do on the ground that its work had been practically completed. Three weeks later it communicated with the vendee, through counsel, stating that damages would be sustained by reason of the failure to accept the goods, and asserting that as a result it would be able to recover in legal proceedings to the amount of \$3,500. However, an offer was made to settle for \$2,000, with the understanding that a credit for this sum would be given, in case of a re-instatement of the order within one year. This suggestion was accepted within the time fixed, and defendant agreed to the compromise. Later, it altered its expressed purpose, and declined to carry out the new promise, made in accordance with the terms of the proposition submitted, and an action was instituted to recover the stipulated sum. The right of the plaintiff to any verdict was denied on several grounds, which will be considered in detail hereafter. Judgment was subsequently entered because of the insufficiency of the affidavit of defense, and this appeal resulted.

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Admittedly, the plaintiff is entitled to damages arising from the breach of the contract to purchase, but it is insisted that the agreement to pay \$2,000 in settlement of the unliquidated claim constituted merely an accord, which was revocable until actual compliance with its terms. The correctness of this position depends upon the construction of the correspondence, which indicates the understanding. There is no conflict in the facts, and the determination of the intention of the parties, resting solely on the interpretation to be placed on their letters, was properly treated as a question of law: *Moers v. Moers*, 229 N. Y. 294, 128 N. E. 202. It is undoubtedly true that an agreement to accept a smaller sum in satisfaction of a claim for a larger is an accord, revocable until satisfied by actual and complete performance. There is a distinction to be drawn, however, between an agreement to accept a promise in satisfaction, and an understanding requiring performance of the promise: *Hosler v. Hursh*, 151 Pa. 415. When the intention is to substitute the former, the contract made is binding (*Laughead v. Frick Coke Co.*, 209 Pa. 368; *Hartzog's Est.*, 270 Pa. 172; 1 C. J. 530, 567), provided, of course, a consideration appears (*Dillon's Est.*, 269 Pa. 234), a requirement sufficiently met when, as here, there is an adjustment of unliquidated demands: *Scranton Gas & Water Co. v. Weston*, 57 Pa. Superior Ct. 355; 1 C. J. 551. The present Chief Justice, in *Shoemaker v. Fegley*, 14 Pa. Dist. R. 850, 856, after commenting upon the pertinent authorities, thus concisely states the rule: "The performance generally is the carrying out of the agreement of accord; but it may be expressly agreed, or the circumstances may clearly show, that the promise or agreement of accord itself is to be taken in satisfaction of the original demand, and, when that is the case, the promise or undertaking, if supported by a sufficient consideration, is to be accepted as equivalent to performance or execution." *Schwartzfager v. Railway*, 238 Pa. 158, and *Foye v. Coal & Coke Co.*, 251

Pa. 409, cases relied upon by appellant, are not in conflict with the view as thus expressed.

An examination of the offer made by the letter of October 29th, and the acceptance of November 5th, leads to the conclusion that the new promise was a substitute for the original claim, based on ample consideration. No demand was made for the payment by any definite date, the only condition was an assent to the proposition by November 6th. A reasonable time for carrying out the new undertaking was evidently contemplated, but an intention to accept the new promise as a termination of the claim for a larger undetermined sum is also apparent. A valid compromise agreement took the place of the former recoverable demand, and was properly enforceable by action in *assumpsit*, as held by the learned court below.

The claim is made, however, that the settlement is not binding because induced by fraud. This position rests on an alleged misrepresentation found in the telegram of October 8, 1920, in which the plaintiff said: "Cannot accept suggested cancellation your order ten eight five calling for special galvanizing equipment all of which is practically completed." The defendant insists that the material had not been manufactured, and that the agreement to pay the \$2,000 would not have been made, had this been known. It may be observed that the affidavit, though denying that the work was "practically completed," is evasive in failing to aver facts showing the extent of the misrepresentation, if any: Cf. *Wakely v. Sun Insurance Office*, 246 Pa. 268. The original order required the purchase of much of the machinery from third parties, which was subsequently to be assembled by plaintiff. The fact that it was not preparing the greater portion was well known to defendant. Further, the telegram was in answer to the notice of cancellation and stated the reason for not agreeing to this action. The agreement to pay \$2,000 was the result of statements made in the letter of October 29th, in which counsel

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claimed damages could be recovered at law to the amount of \$3,500, a mere expression of opinion. This was the representation, which apparently led to the compromise. The allegations made in the affidavit to show fraud were properly held to be insufficient.

It is objected, further, that the statement filed was inadequate to justify the entry of judgment. The allegation is made therein that the plaintiff is a corporation organized under the laws of Illinois. This is said to be ineffective, without an averment of compliance with the acts of assembly regulating foreign corporations in Pennsylvania. Upon the face of the pleadings it appears that the original order was sent from Philadelphia and accepted in Chicago. The goods were to be delivered at various points outside the State for shipment to India. Subsequently, the offer of compromise was sent to the defendant at its place of business, and accepted from its home office, so that the agreement sued upon may be treated as a Pennsylvania contract. But these facts are far from disclosing that the plaintiff was "doing business" here, so as to be subject to the provisions as to registration and filing of powers of attorney, as directed by the Act of June 8, 1911, P. L. 710, amended as to section 4 by the Act of April 22, 1915, P. L. 170. The transaction was interstate business, which makes applicable the principle of *Mearshon & Co. v. Lumber Co.*, 187 Pa. 12, and many subsequent cases which might be referred to. It is urged, however, that this fact must be affirmatively set forth in the declaration, if judgment is to be asked summarily. Such a finding would be justified, if the pleading as a whole showed the plaintiff to come within the purview of the legislation affecting the rights of a foreign corporation to here sue in assertion of its rights, as indicated in *Phoenix Silk Mfg. Co. v. Reilly*, 187 Pa. 527, but this is not so when the statement itself discloses the inapplicability of the statutes referred to.

A foreign corporation may ordinarily maintain an action to enforce its contracts within the State: *Leasure v. Union Mut. Life Ins. Co.*, 91 Pa. 491. It is restricted only when "doing business" within the meaning of our acts requiring, in such case, the performance of certain duties before becoming so engaged. No presumption arises that the plaintiff is a wrongdoer, and has failed to perform its legal obligations: *Blakeslee Mfg. Co. v. Hilton*, 5 Pa. Superior Ct. 184. On the contrary, it will be assumed that it did all the law demanded, and its statement of claim need not negative its violation of a penal statute: 14 a. C. J. 1358; 9 *Fletcher on Corporations*, sec. 5997; *Blue Valley Creamery Co. v. Zimmerman*, 60 Pa. Superior Ct 278; cf. *Zion Church v. St. Peter's Church*, 5 W. & S. 215. Similar determinations have been reached by the appellate courts of many other states, when a like objection has been raised: *Prussian National Ins. Co. v. Eisenhardt*, 153 Mich. 198, 168 N. W. 1097, and cases cited.

The statement is sufficient, and no proper averments are made in the affidavit of defense to indicate the necessity of registration. To merely aver that the corporation was "doing business" within the Commonwealth is not enough; facts must be set forth from which such conclusion can be drawn, to be effective: *Campbell v. Hering*, 139 Pa. 473; *Federal Glass Co. v. Lorentz*, 49 Pa. Superior Ct. 585; *Hall's Safe Co. v. Walenk*, 42 Pa. Superior Ct. 576; *Arms Pocketbook, etc., Co. v. Posey*, 40 Pa. Superior Ct. 361.

A careful review of all the matters suggested convinces us that the learned court below was correct, and the assignments of error are overruled.

The judgment is affirmed.

**Philadelphia, Baltimore & Washington R. R. Co.
v. Perna, Appellant.**

Evidence—Origin and history of transaction—Contract.

1. Where evidence tends to make the fact in issue more or less probable, or shows the origin and history of the transaction between the parties, and explains its character, it is material.

Evidence—Admissibility of—Items claimed established by verdict—Appeals—Contract.

2. Objection to the admissibility of evidence as to certain items claimed, is untenable on appeal, where the verdict establishes that the contract, covering such items, was in truth entered into by the parties.

Appeals—Improper inclusion of items in verdict—Reduction of judgment.

3. Where an item has been improperly included in a verdict, the Supreme Court may, in affirming the judgment, modify it by striking the item therefrom.

Argued January 5, 1922. Appeal, No. 45, Jan. T., 1922, by defendant, from judgment of C. P. No. 1, Phila. Co., Dec. T., 1916, No. 1053, on verdict for plaintiff, in case of Philadelphia, Baltimore & Washington R. R. Co. v. Joseph Perna. Before MOSCHZISKER, C. J., FRAZER, WALLING, SIMPSON, KEPHART, SADLER and SCHAFFER, JJ. Judgment modified and affirmed.

Assumpsit on contract. Before SHOEMAKER, J.

The opinion of the Supreme Court states the facts.

Verdict and judgment for plaintiff for \$1,678.97. Defendant appealed.

Errors assigned, inter alia, were various rulings and instructions appearing by the opinion of the Supreme Court, quoting record.

Henry K. Fries, for appellant.

Chas. Woods Coulston and J. Howard Rhoads, for appellee, were not heard.

OPINION BY MR. JUSTICE SADLER, February 6, 1922:

The City of Philadelphia prepared plans for the building of a sewer on 52d Street, which passed along that highway beneath the tracks of the plaintiff's railroad. Prospective bidders were advised thereby that the railroad company would protect its rails when the excavation made this necessary, the cost to be paid by the contractor, who was directed to include the estimated sum in his proposal. The specifications required that satisfactory arrangement for the necessary support of the right-of-way should be made by the successful bidder. Defendant was awarded the contract on December 17, 1914, and began the construction of the sewer. The railroad line was reached in August of 1915, and consent was secured by Perna to do a part of the work at the crossing, using his own men and materials. It has been found by the jury, under proper instructions, that he then agreed to indemnify the plaintiff for all outlays which it might make in inspecting the work, and guarding against accident, as well as for any other expense to which it was necessarily put by reason of the proposed excavation. Such an understanding was denied by defendant, who insisted his liability was limited to two items, amounting to \$190, covering the cost of the removal of certain timbers, and the reballasting of the track, and he expressed a willingness to pay that sum alone. This action was then instituted to recover the full amount expended by the plaintiff, which right depended upon the existence of the agreement to reimburse, and the question of fact was found in its favor. Unless then some prejudicial error in the admission of testimony, or in the charge of the court, can be pointed out, the judgment should be sustained.

A number of assignments have been filed, which, in effect, make three complaints. It is insisted, first, that it

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was wrong to submit to the jury the plans, specifications and contract made by Perna with the City of Philadelphia, by which the duties in respect to crossings under railroads were defined. The statement of claim had specifically referred to the obligation imposed upon the contractor, by his written agreement with the city, to make suitable arrangements for the protection of the tracks. It is averred that, as a result, the contract of August, 1915, was entered into. The objection to the offer was placed on the ground the suit was based on this agreement,—the existence of which was testified to by the witnesses following the city clerk, who produced the papers, the admission of which is complained of,—and because the evidence was immaterial. The first reason given is without effect, in view of the proof subsequently offered, and the second is without merit. Whether a contract was made, constituted the vital matter for the consideration of the jury. To show that the contractor was under the duty of making arrangements with the railroad, certainly lent probability to the contention that some understanding was had, as insisted by plaintiff. Where evidence tends to make the fact in issue more or less probable, or shows the origin and history of the transaction between the parties, and explains its character, it is material. Further, it made apparent the kind of work which was required, and the authority under which it was conducted, as well as identifying the defendant as the one responsible for any valid claim arising from the construction. The proof did not, of course, establish the case of the plaintiff in its entirety, but it threw some light on the transactions between the parties, and was proper for consideration in determining the fact in issue. The first three assignments are therefore overruled.

Again, the receipt of evidence to show the cost of the necessary inspection and guarding of the tracks, during the sewer construction, is complained of. This objection, suggested in assignments four to seven, is untenable, in

view of the finding that the contract of August, 1915, covering such outlays, was in truth entered into. The same can be said as to the refusal to affirm the fifth and sixth points presented by defendant, in which the court was asked to limit the verdict to the sum of \$190, an amount admittedly due. Nor are we convinced of merit in the complaints made to the portions of the charge included in assignments ten to thirteen. The instructions as a whole were fair and adequate. Reference to the former legal rules as to consideration of testimony of interested parties would seem to have been unnecessary, but we cannot agree that the language used constituted prejudicial error. The witnesses for both sides were referred to, and the words used were applicable to each. The jury was advised that, in passing upon the credibility of every witness, the presence of any fact, which might affect the correctness of his testimony, should be considered.

One matter appears upon the record which requires correction. At the time of the excavation, six tracks were upon the ground. Later, a siding was built by the railroad. As to the shoring of this, the cost was assumed by the plaintiff, in an agreement with the city. The verdict rendered includes a charge of \$17.11 for work at this point, and this sum is not properly chargeable to defendant. The erroneous inclusion of this item does not make necessary a retrial, for substantial justice can be done by directing a reduction of the judgment accordingly: *Gandy v. Klaw*, 269 Pa. 320. To this, we understand, the appellee consents.

The assignments of error are overruled, and the judgment is modified, and is here entered for \$1,661.86, with interest from April 23, 1921, and as so modified it is affirmed.

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Syllabus—Statement of Facts.

Farbo v. Caskey, Appellant.

Negligence—Automobiles—Master and servant—Master's business—Statement of claim—Evidence—Placing admission on record, no affidavit of defense—Practice Act of May 14, 1915, P. L. 483.

1. In an action to recover damages for injuries resulting from an automobile accident, it is necessary for plaintiff to prove, in some adequate manner, not only that defendant was the owner of the car, and the driver his servant, but that such servant was at the time engaged in the master's business.

2. The fact that the defendant was the owner of the car in itself alone furnishes no foundation for his liability.

3. Where the statement of claim avers that the driver was defendant's servant or agent, but does not specifically aver that he was engaged in the performance of defendant's service at the time of the accident, and there is nothing in the evidence to show that the driver was so engaged and such fact is in no way put in the record, it is reversible error for the court to charge that the averment that the automobile was driven by defendant's servant, was a sufficient averment on which to base liability, if the driver was negligent.

4. Admissions, under the Act of May 14, 1915, P. L. 483, by failure of denial by affidavit of defense, are not placed on the record by the court in his charge stating these facts to the stenographer and jury; he must direct the facts to be placed on the notes of trial.

5. Since the practice was not established when this case was tried, the appellate court will not enter judgment for defendant n. o. v., but will send the case back for another trial, in order that the true situation as to the driver's employment at the time of the accident may be properly developed.

Argued January 9, 1922. Appeal, No. 97, Jan. T., 1922, by defendant, from judgment of C. P. No. 4, Phila. Co., Sept. T., 1920, No. 3544, on verdict for plaintiff, in case of Carmel Farbo v. Wesley M. Caskey. Before FRAZER, WALLING, SIMPSON, KEPHART and SCHAFER, JJ. Reversed.

Verdict—Opinion of the Court. [272 Pa.

Trespass for personal injuries. Before FINLETTER, J.
The opinion of the Supreme Court states the facts.

Verdict and judgment for plaintiff for \$15,000. Defendant appealed.

Error assigned, among others, was refusal of defendant's motion for judgment n. o. v.

Owen J. Roberts, of Roberts, Montgomery & McKeehan, with him *Robert T. McCracken*, for appellant.—There was neither proof nor presumption that the car was being driven on defendant's errand: *Scheel v. Shaw*, 252 Pa. 451; *Lockett v. Reighard*, 248 Pa. 24; *Lotz v. Hanlon*, 217 Pa. 339; *Curran v. Lorch*, 243 Pa. 247; *Solomon v. Trust Co.*, 256 Pa. 55; *Dunmore v. Padden*, 262 Pa. 436; *Beatty v. Firestone Tire & Rubber Co.*, 263 Pa. 271; *Maloy v. Rosenbaum Co.*, 260 Pa. 466; *Moon v. Matthews*, 227 Pa. 488; *Hazzard v. Carstairs*, 244 Pa. 122; *Williams v. Floral Co.*, 252 Pa. 140; *Haring v. Connell*, 244 Pa. 439.

David Lavis, for appellee.—Agency was admitted by failure to file an affidavit of defense: Act May 14, 1915, P. L. 483.

The law then presumes defendant was acting in his employer's business: *Brown v. Wineland*, 73 Pa. Superior Ct. 197; *Moon v. Matthews*, 227 Pa. 488; *Hazzard v. Carstairs*, 244 Pa. 122; *Scheel v. Shaw*, 252 Pa. 451, 461; *Maloy v. Rosenbaum*, 260 Pa. 466, 471.

The trial judge stated to the stenographer and the jury that the pleadings admitted the automobile was driven by defendant's servant. That was sufficient under *Buehler v. Fashion Plate Co.*, 269 Pa. 428.

OPINION BY MR. JUSTICE SCHAFFER, February 6, 1922:

Defendant appeals from a judgment recovered in an action for damages for injuries received by plaintiff, who was struck by appellant's automobile.

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Opinion of the Court.

Appellant contends there was no sufficient proof that the automobile, which admittedly belonged to defendant, was being driven at the time of the accident on the owner's business or errand. The trial was allowed to proceed on the theory that this point was adequately covered by the undenied averments of plaintiff's declaration; although the trial judge seems to have had some misgivings as to whether the fact of the chauffeur acting within the scope of his alleged agency was sufficiently proven, as is shown by his statement in the charge that, in his opinion, it would have been better and safer pleading to have expressly averred that the motor car was being driven by defendant's agent or servant in and about his employer's business. The statement of claim does not specifically aver that the chauffeur was, as a matter of fact, engaged in the performance of service for defendant at the time of the accident, but left that open to inference from the averment of the agency. Answering a point of defendant, which raised the question, the court in its general charge instructed the jury, the averment that the automobile was driven by defendant's servant or agent, was a sufficient averment on which to base liability, if the driver was negligent. The difficulty, however, with this assumption is the fact that there was no evidence properly presented on the subject. Although neither the statement of claim nor any part of it had been offered in evidence, the trial judge treated certain of its averments as in the proofs and before the jury, saying to them that there was the admission in the written pleadings, because of the undenied averments in the statement of claim, that the automobile was driven by the defendant's servant or employee, and instructed them this averment was sufficient upon which to base liability if the driver was negligent. This was contrary to our ruling in *Buehler v. United States Fashion Plate Co.*, 269 Pa. 428, where we pointed out that, "A fact averred in the statement of claim, and not specifically denied in the affidavit of defense, is an admitted fact.

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but does not become such for purposes of trial, unless put before the jury in one of three ways: (1) by the presiding judge stating to the official stenographer, in the presence of counsel, that certain facts, which he details and directs to be placed on the notes of trial, are averred in the statement, and not denied in the affidavit, and hence must be treated as admitted; or (2) by counsel directing to be placed on such notes certain detailed facts, which they admit; or (3) by offering in evidence specific parts of the statement of claim, with what counsel conceive to be the replies thereto contained in the affidavit of defense, and having the facts thus sought to be established placed on the notes of trial as admitted, because averred in the statement and not denied in the affidavit of defense." None of the methods indicated was pursued in this case, but, after the testimony was closed, and counsel had summed up, the court in its charge stated the fact we have indicated, essential to plaintiff's recovery, as though it had been put in the record and was before the jury as proof in the case. This does not conform to the practice we have laid down. It will be apparent, at a glance, that the method here followed might be most disastrous to one side or the other in a trial. After delivery of the charge, there would be no opportunity to discuss or explain the admissions, for the first time put in the case just as the curtain drops. In an unbroken line of decisions, we have held that, in an action to recover damages for injuries resulting from an automobile accident, it is necessary for plaintiff to prove, in some adequate manner, not only that defendant was the owner of the car, and the driver was his servant, but that such servant was at the time engaged in the master's business (a typical case is *Scheel v. Shaw*, 252 Pa. 451); and in *Markle v. Perot*, opinion handed down herewith [273 Pa. 4], we reiterate the declaration that the fact defendant was the owner of the car in itself alone furnishes no foundation for his liability.

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Opinion of the Court.

A fair construction of section 13 of the Practice Act of 1915, (P. L. 483, 485) relieves one, who has pleaded the agency of the person committing the act complained of, in the manner here pursued, from producing testimony to show such agency or that the negligent act was done in the course thereof, when these facts are not denied in an affidavit of defense, if due proof thereof is made in accordance with the methods laid down in *Buehler v. United States Fashion Plate Co.*, *supra*; yet, as said by the trial judge in the instant case, good pleading dictates, in addition to an averment of agency, a further allegation that the agent was as a matter of fact acting within the scope of his employment at the time of the accident. For recent relevant construction placed upon this particular section of the act, see *Gillespie v. Pennsylvania Company*, 272 Pa. 393, and cases there cited.

Here, the course pursued by the court below may have misled plaintiff to his great disadvantage, indeed to his undoing,—something, we know, was never intended by the just judge who tried this case. Had the trial been conducted in accord with the rules heretofore laid down by us, it is to be assumed plaintiff's counsel would either have advanced his proofs, on the question of the driver's mission being on his master's account, or protected himself in other adequate ways; but the rulings on that point being in plaintiff's favor, he doubtless was led to feel he could rest content with the case as it stood. It is but fair to state, however, that our opinion in *Buehler v. United States Fashion Plate Co.* had not been published at the time of the present trial, and neither the court below nor counsel had the benefit thereof. Under the circumstances, we shall not enter judgment for defendant non obstante veredicto, but send the case back for another trial in order that the true situation, as to the driver's employment at the time of accident, may be properly developed.

The judgment is reversed with a new venire.

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**Delaney et al. v. Philadelphia Coal & Iron Co.,
Appellant.**

Workmen's compensation—Minors—Agreement.

1. A party who has voluntarily agreed to accept from defendant compensation for injuries, calculated in a particular way, and has received and retained the money paid in accordance therewith, cannot thereafter prosecute a suit to recover additional compensation for the same injuries.

2. Having agreed to and received compensation in the manner provided by the Workmen's Compensation Act, an injured party waives all right to recover by any other method.

3. Though a minor cannot be compelled to accept compensation under the Workmen's Compensation Act, if he was injured while engaged in work in express violation of a statute, he may nevertheless voluntarily do so, and if he does he cannot afterwards maintain an action of trespass to recover damages for the same injuries.

4. A minor who has sustained injuries in the course of his employment, may agree to receive from his employer the compensation provided by the Workmen's Compensation Act, and if he does so with the approval of the board, he and his parents will be bound thereby, unless the agreement is modified or set aside by a supplemental agreement approved by the board, or because it is proved to the satisfaction of the board that the agreement was procured by fraud, coercion or other improper conduct of the employer.

5. *Lincoln v. National Tube Co.*, 268 Pa. 504, distinguished.

Argued January 10, 1922. Appeals, Nos. 34 and 35, Jan. T., 1922, by defendant, from judgment of C. P. No. 2, Phila. Co., March T., 1920, No. 2295, on verdict for plaintiffs, in case of William Delaney, a minor, by his next friend and father, Patrick Delaney, and Patrick Delaney, v. Phila. & Reading Coal & Iron Co. Before FRAZER, WALLING, SIMPSON, KEPHART and SCHAFER, JJ. Reversed.

Trespass for personal injuries to boy fifteen years old at time of accident. Before BARRATT, P. J.

1922.] Verdict—Opinion of the Court.

The opinion of the Supreme Court states the facts.

Verdict and judgment for William Delaney for \$10,000, and for Patrick Delaney for \$2,000. Defendant appealed.

Error assigned, inter alia, was refusal of defendant's motion for judgment n. o. v., quoting record.

Wm. Clarke Mason, for appellant.

Victor Frey, with him *A. T. Ashton*, for appellee.

OPINION BY MR. JUSTICE SIMPSON, February 6, 1922:

William Delaney, a minor, by his father and next friend, Patrick Delaney, and the said Patrick Delaney, in his own right, sued the Philadelphia & Reading Coal & Iron Company to recover damages for injuries received by the minor while employed by defendant at one of its washeries. The statement of claim sets forth that the minor was under the age of sixteen years at the time of the employment and injury, and, without naming the Act of May 13, 1915, P. L. 286, specifies certain particulars in which this statute had been violated in his employment and in the character of work he was required to do. Defendant pleaded, inter alia, that plaintiffs had "elected to accept from this defendant the compensation provided by the Workmen's Compensation Act," that this had been paid to them, and hence they were "barred from bringing this action at law against the said defendant for the said injuries." A verdict and judgment having been recovered by each plaintiff, these two appeals followed.

Several interesting questions are raised by the assignments of error, but only one need be considered. It appears that seventeen days after the accident happened, the minor, with the consent of his father and next friend, entered into an agreement with defendant, in accordance with the provisions of the Workmen's Compensa-

tion Act of June 2, 1915, P. L. 736; and on December 29, 1919, after the minor had passed the age of 16 years, with like consent he entered into a supplemental agreement with defendant under the amendatory Act of June 26, 1919, P. L. 642. These agreements were approved by the Workmen's Compensation Board, were filed with the bureau, and the payments therein specified were made by defendant to the minor and accepted by him down to February 21, 1921 (which was the last due date previous to the trial on March 15, 1921), though this suit had been brought March 17, 1920, and the affidavit of defense averring the applicability of the act and the payments in accordance with its terms, had been filed May 14, 1920. So far as the record of the trial is concerned, the agreements and payments appear only by offers of proof overruled by the court below, but it was frankly admitted, by plaintiffs' counsel, that the facts were as stated, that the moneys received were used by the minor's mother for the support of the family, and that later payments were refused because of counsel's advice to that effect; the moneys actually paid, however, were not returned or tendered to defendant.

It is clear that the facts stated would ordinarily operate as an estoppel to the maintenance of this suit; plaintiffs would not be permitted to receive and retain compensation on an agreed basis, and at the same time prosecute a suit to recover additional compensation for the same injuries on an entirely different basis; by their agreements and receipt of the moneys, they declared the workmen's compensation acts applied, and they were entitled to compensation under them; by the suit, they denied the applicability of the acts and all right to have or retain compensation ascertained according to their terms.

Relying, however, upon our decision in *Lincoln v. National Tube Co.*, 268 Pa. 504, plaintiffs claim that these acts cannot be invoked as a defense where, as here, the employment was in express violation of a statute.

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Opinion of the Court.

The facts in the two cases are, however, essentially different, for there the employer sought to compel the wrongfully employed minor to proceed under the original act, while here the minor, with the consent of his father and next friend, voluntarily accepted relief under it and the amendatory Act of 1919. Though this distinction is vital and controlling, it is not necessary to further consider it, for here the supplemental agreement between the minor and defendant was made under the amendatory act, fourteen months' payments were accepted in accordance therewith, and it provides in section 407 (P. L. 660) that "All agreements for compensation and all supplemental agreements for the modification, suspension, reinstatement or termination thereof, and all receipts executed by any injured employee of whatever age, ... shall be valid and binding, unless modified or set aside as hereinafter provided," that is (section 408), "by supplemental agreement, approved by the board," or (section 413) because it is proved to the satisfaction of the board that the agreement was "procured by the fraud, coercion or other improper conduct of a party, or was founded upon a mistake of law or of fact."

In the present instance the supplemental agreement of December 29, 1919, has never been "modified or set aside" and hence is "valid and binding," and must "operate as a surrender by the parties thereto of their rights to any form or amount of compensation or damages for any injury or death occurring in the course of their employment, or to any method of determination thereof, other than as provided in article III of this act": Section 303 of the Act of June 2, 1915, P. L. 736, 740. This, of course, covers the father's claim also, for when the act applies, defendant is liable only for the payments thereby required.

The judgment in each case is reversed.

McLeod, Appellant, v. Hyman.*Foreign attachment—Dissolution — Appearance — Agreement of counsel—Practice, C. P.*

1. Where the docket entries in a foreign attachment proceeding show the entry of a rule to show cause of action and to dissolve, followed by the entry, "Rule discharged by agreement," the use of the words quoted, will not bar the court from subsequently vacating the discharge, and dissolving the attachment.

2. The use of the word "agreement" in the entry without anything on the record to show its meaning, will not be construed to mean that defendant had appeared by counsel, and that therefore all the parties were in court, and the purpose of the attachment had been served.

3. While the assent of the court to agreement of counsel affecting the proceedings, is assumed until its dissent therefrom is indicated, yet the court can always refuse to sanction such agreement, when right and justice require; and, to reach these ends, it had the power to change what appears upon the record as a prior ruling, particularly where it is done within the term.

Foreign attachment—Affidavit of cause of action—Sales—Contract.

4. An affidavit of cause of action in a proceeding in foreign attachment, must set out a good cause of action, and such facts as give the court jurisdiction, and must not be ambiguous or depend on conjecture or inference.

5. Where the suit is based on a contract of sale of goods, which particularly describes the goods, and manner of packing and delivery and the place of delivery, plaintiff must aver in his affidavit that he made or tendered delivery in accordance with the letter of the contract, setting out the terms and methods of compliance in detail.

If plaintiff avers a refusal to accept goods, he must give the facts relating to the refusal, and state whether it was oral or written.

Argued January 12, 1922. Appeal, No. 139, Jan. T., 1922, by plaintiff, from order of C. P. No. 4, Phila. Co., June T., 1921, No. 2, making absolute rule to dissolve foreign attachment, in case of J. A. McLeod, to the use

1922.] Statement of Facts—Opinion of Court below.

of Palmetta Guano Corporation, v. A. Hyman, otherwise known as Abram Hyman, and Peoples National Fire Ins. Co., garnishee. Before MOSCHZISKEB, C. J., FRAZER, WALLING, KEPHAET and SCHAFER, JJ. Affirmed.

Rule to dissolve foreign attachment.

MCCULLEN, J., filed the following opinion:

"This is a foreign attachment proceeding. The garnishee having taken a rule on plaintiff to show cause of action and why the attachment should not be dissolved, plaintiff filed an affidavit of cause of action, which was amended by a 'supplemental' affidavit. Without passing on the question of plaintiff's right to thus amend his affidavit of cause of action (as to which see *Eldridge v. Robinson*, 4 S. & R. 548, and *Jacobs v. Tichener*, 27 W. N. C. 35), we have concluded that both affidavits are insufficient and, therefore, the attachment must be dissolved.

"From the affidavits filed, it appears that, on May 20, 1920, at Darlington, South Carolina, plaintiff J. A. McLeod and defendant A. Hyman, both of that place, entered into a written contract, under which McLeod agreed to sell and deliver to Hyman, on or before November 1, 1920, at any point designated by Hyman within the limits of the town of Darlington, '200 bales of smooth long staple lint cotton, one and one-quarter inch long staple, of grade no lower than strict middling, each of said bales to weigh not less than 500 pounds,' for which Hyman agreed to pay upon delivery. Plaintiff sues to recover for an alleged breach of this contract by Hyman, the buyer, in refusing to accept and pay for the goods.

"The sale was by description and was of smooth long staple lint cotton of a particular length ($1\frac{1}{4}$ inches) and of a grade or quality not lower than strict middling, and the delivery was to be made in 200 bales, weighing not less than 500 pounds each. Unless plaintiff made or tendered delivery in accordance with the letter of the contract, no obligation to accept or to pay rested upon

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defendant: Fogel v. Brubaker, 122 Pa. 7, 14; Jones v. Jennings, 168 Pa. 493; Wilson v. Belles, 22 Pa. Superior Ct. 477; American Manufacturing Co. v. Brady, 51 Pa. Superior Ct. 619, 622; HARE, J., in Clark v. Wright, 5 Phila. 439.

"In paragraphs 4 and 5 of the 'supplemental affidavit,' the plaintiff avers as follows: 'J. A. McLeod, on November 1, 1920, within the limits of the town of Darlington, South Carolina, tendered delivery to the defendant, during business hours, of two hundred (200) bales of smooth long staple lint cotton, weighing in the aggregate 105,390 pounds, in pursuance of said contract. Defendant refused to accept said two hundred (200) bales of smooth long staple lint cotton.'

"There is no averment that the cotton tendered was of the length or of the grade prescribed by the contract, nor is it averred the bales tendered were each in weight not less than 500 pounds. It does not follow from the averment of an aggregate weight of 105,390 pounds that the 200 bales tendered weighed each not less than 500 pounds; and we cannot infer that the cotton was 1 $\frac{1}{4}$ inches long, or of a grade not lower than strict middling, in the absence of any statement whatever as to length or grade. There is no averment that the delivery was tendered at the point within the town of Darlington designated by the buyer, A. Hyman, or that the latter failed to designate any point within said town.

"The averment, 'that defendant refused to accept said two hundred (200) bales of smooth long staple lint cotton,' does not give any facts as to the refusal, or set forth whether the alleged refusal was oral or written.

"In Mindlin v. Saxony Spinning Co., 261 Pa. 354, a similar averment was held insufficient, the court saying, 'The real facts are not set out and it does not appear whether such alleged refusal was oral or written.' The requirements in foreign attachment proceedings were in that case thus succinctly stated by the court: 'The affidavit must set out a good cause of action and such facts

1922.] Opinion of Court below—Arguments.

as give the court jurisdiction and *must not be ambiguous or depend upon conjecture or inference.*'

"In the original affidavit filed in this case there was an omission of the date and place of tender, an omission of the date of defendant's refusal to accept and an omission of the date and place of plaintiff's resale of the merchandise; in the supplemental affidavit it is sought to amend and to remedy these defects. . . . , but the supplemental affidavit in our opinion is itself vitally defective, for the reasons we have mentioned. [Therefore] the rule to dissolve the attachment is made absolute."

Plaintiff appealed.

Errors assigned were (1) reinstating rule to discharge and (2) making rule absolute, quoting record.

H. M. McCaughey, with him *Walter W. Hess*, for appellant.—The court erred in vacating the order discharging the rule to show cause of action and why attachment should not be dissolved, in reinstating that rule: *Bookwalter v. Bookwalter*, 75 Pa. Superior Ct. 577; *Powell v. Shank*, 3 Watts 235; *Black v. Black*, 206 Pa. 116; *Miller v. Cockins*, 239 Pa. 558; *Swecker v. Reynolds*, 246 Pa. 197; *Lerner v. Felderman*, 64 Pa. Superior Ct. 287; *Schober v. Mather*, 49 Pa. 21.

The affidavit of cause of action was sufficient: *Hastings v. Speer*, 34 Pa. Superior Ct. 478; *Dougherty v. Davis*, 51 Pa. Superior Ct. 229; *Clement v. March Co.*, 22 Pa. Dist. R. 731.

Hampton L. Carson, with him *J. Hector McNeal*, for garnishee, appellee.—There was no appearance: *Turner v. Larkin*, 12 Pa. Superior Ct. 284.

The affidavit was fatally defective: *Mindlin v. Spinning Co.*, 261 Pa. 354; *Fogel v. Brubaker*, 122 Pa. 7; *Tete v. Eshler*, 11 Pa. Superior Ct. 224; *Gobey v. Wallace*, 48 Pa. Superior Ct. 61; *American Mfg. Co. v.*

Brady, 51 Pa. Superior Ct. 619; Diamond City B. P. & P. Co. v. Murdoch-James Co., 270 Pa. 455.

OPINION BY MR. CHIEF JUSTICE MOSCHZISKE, February 6, 1922:

The order dissolving the foreign attachment, here appealed from, is well sustained in the opinion of the learned court below, which we adopt and direct to be published in connection herewith.

The points argued before us, not covered by the opinion just adopted, need but little discussion. In answer to the argument that, as defendant appeared by counsel, therefore, all parties are in court and the purpose of the attachment has been served, it is sufficient to say there is nothing upon the record to indicate any such appearance, either formally or informally. The contention that the statement in the docket entries, "June 13, 1921, Rule discharged by agreement," tied the hands of the court below so that it had no legal right to vacate such "discharge" cannot be sustained. There is nothing upon the record to show what is meant by the word "agreement" in the original docket entry, whether the alleged agreement was made in open court or otherwise, and, if not made in the former way, all such agreements have to be in writing, under the rules of the court below. Moreover, while the assent of the court to agreements of counsel, affecting the proceedings, is assumed until its dissent therefrom is indicated, yet, of course, the court can always refuse to sanction such agreements, when right and justice so require; and, to reach these ends, it has the power to change what appears upon the record of a prior ruling, particularly where, as here, it is done within the term. Finally, it remains to say only that the words in the affidavit of cause of action, that "the cotton was tendered in pursuance of said contract," so largely depended on by appellants to show the adequacy of the affidavit, are insufficient for that purpose, because they merely represent the conclusion of the af-

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fiant, and therefore offend the rule, stated with the citation of an authority by the court below, that such affidavits "must not be ambiguous or dependent upon conjecture or inference."

The order appealed from is affirmed.

Maharius et al. v. Morris & Co., Appellant.

Negligence—Automobile—Street crossing—Pedestrian.

Recovery may be had against the owner of an automobile which struck a pedestrian at a regular street crossing, where it appears that the car, suddenly and without warning, turned into the street which plaintiff was crossing and struck him when he was in plain view of the chauffeur, and when he had not gone more than ten feet in his passage across the street.

Argued January 13, 1922. Appeal, No. 193, Jan. T., 1922, by defendant, from judgment of C. P. No. 5, Phila. Co., June T., 1920, No. 5288, on verdict for plaintiff, in case of James Maharius, by his mother Perrepo Maharius and Perrepo Maharius v. Morris & Co. Before MOSCHIZSKER, C. J., FRAZER, WALLING, KEPHART and SCHAFER, JJ. Affirmed.

Trespass for personal injuries. Before BALDRIGE, J., specially presiding.

The opinion of the Supreme Court states the facts.

Verdict and judgment for plaintiff for James Maharius for \$2,000 and for Perrepo Maharius for \$500. Defendant appealed.

Error assigned, inter alia, was refusal of defendant's motion for judgment n. o. v., quoting record.

Samuel S. Herman, with him *Harry S. Ambler, Jr.*, for appellant.

William T. Connor, with him *John R. K. Scott*, for appellee.

PER CURIAM, February 6, 1922:

On January 30, 1920, at 11 a. m., plaintiff, a boy of sixteen, was crossing, afoot, from the southwest to the northeast side of Ridge Avenue, at the intersection of that highway with the east side of Broad Street, using the regular crossing stones; before starting, he looked for approaching vehicles, and saw none that threatened his safety. Defendant's truck, which was being driven north on Broad Street, suddenly, without warning, turned into Ridge Avenue and struck plaintiff, when the latter was in plain view of the chauffeur and had not gone more than ten feet in his passage across the street.

The issues as to the alleged negligence of defendant and contributory negligence of plaintiff were all submitted to the jury and found in favor of the latter. Defendant has appealed, contending that it is entitled to judgment notwithstanding the verdict; with this conclusion, we cannot agree.

The judgment is affirmed.

Lafferty et al., Appellants, v. Armour & Co.

Negligence—Infants—Driving boy from wagon—Wanton act of driver—Case for jury—Nonsuit.

1. Where a boy, six and one-half years old, climbs upon a wagon by permission of the driver, and, while riding thereon, the driver, without stopping and putting the child off, strikes at him with a whip, and the boy in his fright and haste jumps off the wagon and is injured, the owner of the wagon and employer of the driver is liable in damages for the injuries sustained.

2. In such case it is the driver's wanton act, and not the fact that the boy got on the wagon with the driver's permission, that is the determining factor as to the owner's liability.

3. *Hughes v. Murdock Storage & Transfer Co.*, 269 Pa. 222, distinguished.

1922.] Statement of Facts—Opinion of the Court.

Argued January 6, 1922. Appeals, Nos. 76 and 77, Jan. T., 1922, by plaintiffs, from order of C. P. No. 4, Phila. Co., Sept. T., 1919, No. 4622, refusing to take off nonsuit, in case of Louis Lafferty, Jr., by his father and next friend, Louis Lafferty, Sr., and Louis Lafferty, Sr., in his own right, v. Armour & Co. Before MOSCHZISKER, C. J., FRAZER, WALLING, SIMPSON, KEPHART, SADLER and SCHAFFER, JJ. Reversed.

Trespass for personal injuries. Before FINLETTER, J. The opinion of the Supreme Court states the facts.

The court entered a compulsory nonsuit which it refused to take off. Plaintiff appealed.

Error assigned was refusal to take off nonsuit, quoting record.

Daniel G. Murphy, of Murphy & Levy, for appellants.—The case was for the jury: Holzheimer v. Lit Bros., 262 Pa. 150; Guinney v. Hand, 153 Pa. 404; Parker v. Matheson Motor Co., 241 Pa. 461; Petrowski v. Ry., 263 Pa. 531; Minute v. Ry., 264 Pa. 93; Brennan v. Merchant & Co., 205 Pa. 258.

W. W. Porter, of Porter, Foulkrod & McCullagh, for appellee.—The case is ruled by Hughes v. Murdock S. & T. Co., 269 Pa. 222.

OPINION BY MR. JUSTICE SCHAFFER, February 6, 1922:

The court below entered a compulsory nonsuit; from the refusal to take it off, plaintiffs appeal.

The circumstances out of which the action grew are these: A two-horse wagon belonging to defendant, was being driven by one of its employees, on its business, along a street in Philadelphia. A number of boys were playing in the highway, among them, the minor plaintiff, six and a half years old. As the driver approached, one of the boys hailed him with a request for a ride;

the team slowed up, the boys got in the wagon, and were permitted, by the driver, to ride for three blocks, when he turned, swung his whip, and with an oath ordered them off. The whip struck the minor plaintiff on the head, and, in his fright and haste in jumping off the wagon, his foot caught in a chain, hanging from the tail-board, he was dragged a considerable distance and seriously injured.

The trial judge entered a compulsory nonsuit, which the court in banc declined to take off, holding the case of *Hughes v. Murdock Storage & Transfer Co.*, 269 Pa. 222, prevents recovery. We do not regard the decision in that case as controlling here. Hughes was fourteen years of age at the time he was injured, this plaintiff but six and a half years old. In both cases, the driver permitted the injured boy to ride on the vehicle; in the one relied on, there was no wanton or wilful act on the driver's part, whereas, in the one we are considering, there was a most wanton and cruel act by the employee in charge of the wagon. In the case cited, it was said by Mr. Justice KEPHART: "The master, short of wantonness, did not owe him the duty of safe carriage or to see that he safely alighted." It is this distinction, that there was wantonness on the driver's part, in the present case, which takes it out of the control of the Hughes decision. The difference between the two cases is made clear by this further expression in that opinion: "The master was under no duty to take care of the boy by keeping him off the truck, nor liability for injuries resulting from his voluntarily leaving it." Here, the boy did not voluntarily leave the wagon, but was driven from it by the assault of the driver. In policing his wagon, the driver was performing a duty for the master. However the plaintiff came to get on the wagon, whether by the driver's permission or as a trespasser, once on, if the driver, recognizing the duty to his employer not to permit the boy to continue in the wagon, had given him opportunity to alight, and in so doing, without any wanton

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act on the driver's part, the boy had been injured, the Hughes case would be a controlling authority against recovery from the owner of the vehicle, but where, as here, the order to leave the wagon was accompanied by such an act as lashing the boy with a whip, the master, who by entrusting the wagon to the servant, gave him authority over persons riding upon it, must respond for the result of his wanton act. This case is ruled not by Hughes v. Murdock, but by Hyman v. Tilton, 208 Pa. 641, in which it was held that where a boy of tender years climbs upon a moving dray, and while riding thereon, the driver, without stopping and putting the child off, strikes at him with a whip, and the boy is either knocked off by the blow, or through fright falls off and is injured, the owner of the dray is liable in damages for the injuries sustained.

If the plaintiff had attempted to alight from the wagon and been injured, without any wanton act on the driver's part, the defendant would not have been responsible. It is the driver's inconsiderate act in putting him off, not the fact that he got on the wagon with the driver's permission, which is the determining factor as to defendant's responsibility for the injuries the boy sustained.

The judgment is reversed with a new venire.

Simkin v. McGovern, Appellant.

Judgment—Opening judgment—Refusal to open—Abuse of discretion—Review.

The Supreme Court will not reverse an order refusing to open a judgment, where it is not convinced of an abuse of discretion by the lower court in making the order.

Argued January 13, 1922. Appeal, No. 178, Jan. T., 1922, by defendant, from order of C. P. No. 5, Phila. Co., Dec. T., 1920, No. 5395, discharging rule to open judgment, in case of Jacob Simkin, trading as Owners' Auto

Statement of Facts—Opinion of the Court. [272 Pa. Finance Co. v. Owen P. McGovern. Before MOSCHIZISKE, C. J., FRAZER, WALLING, KEPHAET and SCHAFER, JJ. Affirmed.

Rule to open judgment.

The opinion of the Supreme Court states the facts.

Rule discharged. Defendant appealed.

Error assigned, inter alia, was order, quoting it.

Joseph M. Smith, for appellant.

Ralph S. Croskey, with him *George J. Edwards, Jr.*, for appellee.

PER CURIAM, February 6, 1922:

Judgment by confession was entered on a bailment contract, for the balance due on a second-hand motor truck, acquired by defendant from plaintiff; this appeal is from a refusal to open the judgment. Since we are not convinced of an abuse of discretion,

The appeal is dismissed.

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ACCORD AND SATISFACTION.

1. *Performance—Agreement to accept promise in satisfaction—Consideration—Written evidence—Law for court.*

In an accord and satisfaction, the performance generally is the carrying out of an agreement of accord, but it may be expressly agreed, or the circumstances may clearly show, that the promise or agreement of accord itself is to be taken in satisfaction of the original demand, and, when that is the case, the promise or undertaking, if supported by a sufficient consideration, is to be accepted as equivalent to performance or execution.

An adjustment of unliquidated damages is a sufficient consideration for the promise.

Where there is no conflict in the facts, and the determination of the intention of the parties as to the accord, rests solely on the interpretation to be placed on their letters, the question is one of law for the court. **Meaker Galvanizing Co. v. McInnes**, 561.

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1. *Negligence—Facts not denied admitted—Practice, C. P.—Act of May 14, 1915, P. L. 483—Evidence—Damages—Contributory negligence.* **Gillespie et ux. v. Penna. Co.**, 393.

2. *Practice, C. P.—Contradictory or equivocal averments—Sale.* **Iron Trade Products Co. v. Wilkoff Co.**, 172.

3. *Practice, C. P.—Doubtful averments—Res adjudicata.* **O'Malley v. O'Malley**, 528.

4. *Practice, C. P.—Fraud—Insufficient averment.* **Meaker Galvanizing Co. v. McInnes**, 561.

5. *Practice, C. P.—Statement—Foreign corporation—Registration—Doing business—Presumption of legality.* **Meaker Galvanizing Co. v. McInnes**, 561.

6. *Practice, C. P.—Trial—Question not raised by affidavit of defense—Act of May 14, 1915, P. L. 483.* **Wm. Zeller Co. v. Hartford Fire Ins. Co.**, 386.

7. *Promissory notes—Time of payment—Condition—Presentment—Reasonable time—Insufficiency.* **North Penn Bank v. Whetstone**, 519.

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1. *Contracts—Payment—Accord and satisfaction—Agreement to receive back merchandise—Contemporaneous agreement—Principal and agent—Evidence—Party dead—Agent—Authority—Accepting benefits—Estoppel—Hearsay—Harmless error—Delay—Act of May 23, 1887, P. L. 158. Danish Pride Milk Products Co. v. Marcus, 340.*

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APPEALS.

1. *Assignments of error—Rule of Court 26—District matters under one assignment—New trial—Reasons therefor.*

Where appellant desires simply to raise the question of an alleged abuse of discretion by the court in refusing to grant a new trial, it is proper to set forth all the distinct reasons which accompanied the request for a new trial in one assignment of error; but where appellant wishes to insist on the distinct reasons as showing of separate errors, each reason must be incorporated in a separate assignment and these assignments must show exceptions noted in the court below. *Mix v. North American, 209 Pa. 636, explained and distinguished. Duff v. Hamlin, 245.*

2. *Assignments of error—Charge—Points and answers—Exceptions—Act of March 24, 1877, P. L. 38.*

Request for instructions and answers thereto form part of the charge; and even where such requests are presented under the Act of March 24, 1877, P. L. 38, in writing, and the answers to the court are duly excepted to, unless there is a formal request made at the trial to reduce the charge to writing and file it of record, neither it nor the answers to points can be considered on appeal.

An assignment of error based on an answer made by the trial judge at the end of his charge, to an oral request for further instructions, will not be considered, where no request was made whatever that the charge should be filed of record. *Duff v. Hamlin, 245.*

3. *Assignments of error—Criminal Law—Murder—Confession.*

APPEALS—continued.

The Supreme Court will not, at the argument of an appeal in a murder case, consider a complaint as to the manner in which a confession was secured, where no error was assigned to the admission of the confession. **Com. v. Patterson**, 522.

4. *Charge and points—Filing of record—Assignments of error.*

Where an appellant has not asked that the charge and the points with their answers be written out and filed of record, they are not available for assignments of error. **Wm. Zoller Co. v. Hartford F. Ins. Co.**, 386.

5. *Evidence—Exception.*

Where no exception was taken to the admission of evidence at the trial, no objection to its admission can be made on appeal. **Pittsburgh F. & L. Co. v. Dravo Contracting Co.**, 118.

6. *Equity—Findings of fact by chancellor—Evidence—Mental capacity to execute deed—Review.* **Colwes v. Meyer**, 323.

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10. *Foreign attachment—Plaintiff attaching money in his own hands—Quashing writ—Irregularity in record—Res adjudicata—Measure of damage for breach of warranty—Acts of April 26, 1917, P. L. 102 and April 18, 1919, P. L. 72—Practice—Questions not raised below.* **Pasquinelli v. Southern Macaroni Mfg. Co.**, 468.

11. *Improper inclusion of items in verdict—Reduction of judgment.*

Where an item has been improperly included in a verdict, the Supreme Court may, in affirming the judgment, modify it by striking the item therefrom. **Phila., B. & W. R. R. v. Perna**, 569.

12. *Marriage—Proof of—Cohabitation and reputation—Illicit intercourse—Presumption—Claim of alleged widow of decedent—Husband and wife—Decedents' estates—Evidence—Findings of fact—Orphans' court.* **Stevenson's Estate**, 291.

13. *Modification of judgment—Acts of May 20, 1891, P. L. 101, and April 22, 1905, P. L. 286*

APPEALS—continued.

Where the Supreme Court on appeal allows certain items of increase to the amount of the verdict for plaintiff and it appears that the questions involved in the items are purely legal, the judgment will be entered, in accordance with the Acts of May 20, 1891, P. L. 101, and April 22, 1905, P. L. 286, as the court below should have entered it. **Osterling v. Allegheny County**, 458.

14. *Motion for judgment n. o. v.—Request for binding instructions—No general request to file charge, points and answers—Act of April 22, 1905, P. L. 286.*

Under the specific provisions of the Act of April 22, 1905, P. L. 286, an assignment of error to the refusal of a motion for judgment n. o. v., based on a refusal of a written request for binding instructions, is proper, although the appellant had made no request whatever that the charge, points or answers should be filed of record. **Duff v. Hamlin**, 245.

15. *Negligence—Injuries to minor child—Damages—New trial—Discretion of court—Abuse. Rankin v. Ward Baking Co.*, 108.

16. *Negligence—Minors—Employment of minor—Certificate—Charge—Harmless error—Act of May 18, 1915, P. L. 286—Evidence inadmissible when offered—Age of minor—Fact of age—Ignorance of age. Pinter v. Baker*, 541.

17. *Negligence—Statement—Evidence—Allegata and probata—Amendment—Surprise—Waiver—Continuance—Proximate cause—Fire—Oil on river—Things to be naturally anticipated—Act of God or vis inertia. Pittsburgh Forge & Iron Co. v. Dravo*, 118.

18. *Practice, C. P.—Agreement as to facts—Evidence—Printing testimony.*

On appeal, it is proper and commendable practice for the parties to agree, if they so desire, that the facts necessary for the determination of the case are contained in the opinion of the court below, and are correct; that questions raised below were not disposed of, because they became immaterial upon the decision of the point that was considered; that if the Supreme Court determines the decision of the lower court on the question considered is correct, the judgment shall be affirmed; that if the Supreme Court decides the contrary, the record shall be remitted for appropriate action; that certain testimony specifically referred to is printed in the appendix, and that the printing of the other testimony and exhibits in the case is dispensed with as being immaterial to the decision

APPEALS—continued.

of the question involved in the appeal. **Russell v. F. Mat. F. Ins. Co., 1.**

19. *Question not presented in court below—Statement of questions involved.*

Where a question is not raised in the court below, it will not be considered on appeal.

If a question is not included, or plainly suggested, in the statement of questions involved, it will not be considered by the appellate court. **Sullivan v. B. & O. R. R., 429.**

20. *Statement of questions involved—Evidence.*

Questions sought to be raised in the appellate court will not be considered if they are not included in the appellant's statement of questions involved. **Glockner v. Penna. R. R., 312.**

21. *Statement of question involved—Excessive verdict.*

An objection that a verdict is excessive is not properly before the appellate court where it is not included in the statement of questions involved. **Crumley v. Penna. R. R., 226.**

22. *Verdict—New trial—Discretion of court—Abuse—Excessive verdict.*

The exercise of the power to set aside a perverse verdict, when injustice is apparent, is ordinarily for the court below. It is only where there is an abuse of discretion that a verdict will be set aside by the appellate court. **Sullivan v. B. & O. R. R., 429.**

23. *Verdict—Amount—No loss shown to appellant.*

Where, on an appeal by plaintiff from a judgment on a verdict in favor of himself in an action for goods delivered under a contract of sale, defendant sets up a breach of a second contract, the appellate court will not discuss questions relating to the second contract where the amount of the verdict in plaintiff's favor shows that defendant received no allowance on the second contract. **Duff v. Hamlin, 245.**

24. *Trusts and trustees—Principal and agent—Agent taking property in his own name—Right to damages for injury to property by change of grade—Parol promise—Act of April 22, 1856, P. L. 532—Evidence—Memorandum in writing—Witness—Failure to object to evidence at trial—Waiver. **Christian Moerlein Brewing Co. v. Rusch, 181.***

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2. *Mortgage—Bond—Judgment—Petition to compel assignment.* **Butler County Natl. Bank v. St. Michael's Greek Catholic Church**, 440.

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2. *Appeals—Charge—Points and answers—Exceptions—Act of March 24, 1877, P. L. 38.* **Duff v. Hamlin**, 245.

3. *Appeals—Criminal law—Murder—Confession.* **Com. v. Patterson**, 522.

4. *Appeals—Rule of Court 26—Distinct matters under one assignment—New trial—Reasons therefor.* **Duff v. Hamlin**, 245.

ATTORNEY-AT-LAW.

1. *Municipalities—Controller—Refusal to countersign warrant—Ministerial capacity—Approval of bill for legal services by council—Presumption—Mandamus—Specific remedy at law—Attorney-at-law—Contract to lowest bidder.* **Com. ex rel. v. Tice**, 447.

2. *Retention of client's money—Breach of fidelity to client—Disbarment—Trial by jury—Acts of April 14, 1834, P. L. 333, and June 16, 1836, P. L. 784.*

In a disbarment proceeding, an attorney is not entitled to a trial by jury.

Where an attorney-at-law receives from a client a large sum of money under the allegation that it was necessary to secure bail, and subsequently acquiesces in the quashing of a writ of habeas corpus, without consulting his client and without his knowledge, and there is no evidence of the commission of any crime by the client, it is proper for the court, under the Act of April 14, 1834, P. L. 333, summarily to disbar the attorney without the allowance of a jury trial; and this is the case although the attorney claims that he retained the money as a fee.

ATTORNEY-AT-LAW—*continued.*

In such case there would be nothing for a jury to pass upon; for, whatever fee the attorney might have been entitled to claim, if he had acted according to proper standards of professional honor, was forfeited by his fraudulent conduct and lack of fidelity to his client. **Balogh v. Jackson**, 482.

AUTOMOBILES.

1. *Negligence—Collision—Car driven by minor son without license.* **Scorsoni v. Pittsburgh P. & P. Co.**, 253.

2. *Negligence—Collision between car and sled—Res ipsa loquitur—Sudden emergency—Obstruction of view—Notice of sledding.* **Leslie v. Catanzaro**, 419.

3. *Negligence—Infant — Crossings — Contributory negligence—Conflicting evidence—Case for jury—Evidence of negligence from accident—Res ipsa loquitur.* **Rankin v. Ward Baking Co.**, 108.

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5. *Negligence—Street crossing—Pedestrian.* **Maharius v. Morris**, 587.

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1. *Insurance—Livestock insurance—Loss of hogs by carrier—Proofs of loss—Waiver—Evidence—Stockyard books—Best evidence—Identification of handwriting—Bill of lading—Acceptance of limited bill of lading. Zoller Co. v. Hartford Fire Ins. Co., 386.*

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The authorities of a city of the second class have no right to refuse a permit for the construction of a garage because of the disapproval of the location by the board of city planning, where it appears that such board had not as yet made its final report as to the areas in which various trades and business could be carried on, and no hearing thereon was had before the city council as required by the Act of June 21, 1919, P. L. 570.

Where an ordinance provides that an official named shall issue a building permit, when the applicant therefor shall have complied with all the requirements of the laws and ordinances, the duty of the official is merely ministerial, and if he refuses to issue the permit, mandamus is the proper remedy to compel him to do so.

The fact that the proposed garage is to be built in a residential neighborhood, and that its occupation and use will constitute a nuisance, is no ground for refusing a permit.

The question as to the legality of the alleged intended use must await determination in proper proceedings after such use is attempted to be made of the building.

The fact that the permit may be useless to the applicant, is no reason for refusing to issue it. *Coyne v. Prichard, 424.*

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2. *Libel—Ambiguous expression. Abersold v. Marcus, 199.*

3. *Negligence—Employee of independent contractor—Moving crane—Warning—Notice—Master and servant—Contributory negligence. Craig v. Riter Conley Mfg. Co., 219.*

4. *Negligence—Infants—Driving boy from wagon—Wanton act of driver—Nonsuit. Lafferty v. Armour, 588.*

5. *Negligence—Piling boards in street—Evidence—Infants. Sheplan v. Kramer Woodworking Co., 518.*

6. *Negligence—Railroads—Assumption of risk—Knowledge of risk. Dollar Savings F. & T. Co. v. Penna. Co., 364.*

7. *Negligence—Railroads—Joint use of tracks by two companies—Death—Contributory negligence—Anticipating negligence—Judgment n. o. v. Hastings et al. v. So. Shore R. R., 212.*

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CHURCH LAW.

1. *Inactive or extinct church—Appointment of trustee—Findings of fact—Appeal—Acts of June 5, 1913, P. L. 435; April 18, 1919, P. L. 72; May 17, 1921, P. L. 861—Cemeteries—Burial grounds—Sale.*

In a proceeding under the Act of June 5, 1913, P. L. 435, to appoint a trustee for a church alleged to have become inactive or extinct, a finding by a court below on sufficient evidence that the church has not become inactive, or extinct, but is under control of active trustees, although it has no church

CHURCH LAW—continued.

building, is, under the Act of April 18, 1919, P. L. 72, entitled to the same weight as the verdict of a jury and such finding will not be reversed on appeal.

Such church property when used as a cemetery, cannot be sold, unless the sale is authorized by statute; the Act of June 5, 1913, P. L. 435, and amendment of May 17, 1921, P. L. 861, make no provision for sale. **Mt. Calvary M. P. Church, 453.**

CONTRACT.

1. Building contract—Architect's certificate—Fraud, collusion or caprice—Nonperformance.

Where a building contract provides that the architect's certificate shall be final and conclusive, the amount specified therein can be recovered, unless there is proof that it was given as the result of fraud, collusion or caprice.

Where a building contract provides that all payments shall be due when certificates for the same are issued, that no certificate given or payment made except the final certificate or final payment shall be conclusive evidence of the performance of the contract, and that no payment shall be construed to be acceptance of defective work or improper materials, and a final certificate has been given, honestly and in good faith, the defense of nonperformance of the contract is not available. **Biset v. Smith, 31.**

2. Construction—Architect—Commissions—Gross percentage—Cancellation of contract.

It is an unbending rule that all the words of a contract are to be given an appropriate meaning whenever it is reasonably possible so to do.

Where an architect's contract provides that he shall be paid for his services a gross percentage upon the entire cost of a building to be erected, such payments to be made in certain percentages as the work progresses, and that the contract may be cancelled, in which event he is to receive, as full compensation, the percentages then due, he will be entitled to recover only the percentages which were payable at the time the cancellation was in fact made.

Where an architect's contract provides that he shall receive a gross percentage upon the completion and acceptance of a building, and only a part is completed and accepted, he will be entitled to the full percentage on that part, since there was a completion and acceptance so far as it is concerned.

CONTRACT—continued.

Where an architect's contract provides that a given percentage is to be paid upon the cost of the work and the building is not erected, so that there is no actual cost, the basis upon which the percentage is to be calculated must be determined according to equitable principles, as of the date when the architect's work was actually performed.

Where a party has a right to cancel a contract his reasons for so doing are wholly immaterial.

Harlow v. Beaver Falls Borough, 188 Pa. 263, and **Sauer v. McKees Rocks School District**, 243 Pa. 294, cited and explained. **Orth v. Board of Education**, 411.

3. *Evidence—Admissibility of—Items claimed established by verdict—Appeals.* **Phila. Balt. & W. R. R. v. Perna**, 569.

4. *Evidence—Origin and history of transaction.* **Phila. Balt. & W. R. R. v. Perna**, 569.

5. *Exchange of automobiles—Breach of contract.*

The measure of damages for breach of a contract to pay a fixed sum in a particular commodity or specific articles of property, is the sum stated, and the value of the commodity at the time of the breach is not material.

Where a person agrees to purchase from a dealer an automobile, to be delivered at a specific time, paying part of the price by delivering a used car at an agreed valuation, and the balance in cash on delivery of the new car, which could not be obtained, the measure of damages is the sum at which the used car was valued, and not its value at the time of the breach.

The loss sustained by the seller's breach, under ordinary circumstances, is determined by the difference between the market price and the contract price at the time of delivery; but where the article cannot be obtained, the measure is the actual loss which the vendee can show he has sustained. **Gleekler v. Painter**, 131.

6. *Master and servant—Compensation—Allotments of stock—"Voluntarily quit" employment.*

Where a contract of employment between a corporation and one of its employees provides that the employee should have the right to participate as "special compensation to employees under bonus plan," in allotments of stock, but that this right should be forfeited if the employee should voluntarily quit the company's service within five years, the right is forfeited if the contract of employment is terminated by mutual consent within five years.

CONTRACT—continued.

To "voluntarily quit" the employment, means to quit without coercion or compulsion. *Schotter v. Carnegie Steel Co.*, 437.

7. *Municipal contracts—County courthouse—Alterations—Commissions—Reduction—Consideration — Architect — Approval of contract by grand jury and quarter sessions—Amendment of statement—Quantum meruit—Statute of limitations—Act of April 15, 1834, P. L. 539.*

County commissioners have no authority to enter into a contract with an architect to furnish plans and specifications and superintend additions and alterations to an existing courthouse, prior to securing the approval of the grand jury and court of quarter sessions to such additions and alterations, as required by the Act of April 15, 1834, P. L. 537, 539.

An agreement for drawings, plans, specifications, contracts and general supervision of the work, is for a part of the enlargement of the building as much as any other work or material.

Where the architect brings an action against the county on such a contract, he cannot amend his statement by adding a claim on a quantum meruit for the preparation of plans and specifications for the information of the grand jury, if it appears that the claim is not brought upon the record until thirteen years after the work was done, as the statute of limitations has then run.

If the suit involves additions and alterations to a county jail, and they were properly authorized, the architect may recover for his services thus rendered.

Where it appears that, at the architect's request, a change of material for the jail was made involving a large increased cost to the county, an agreement by the architect to reduce his commissions from the amount stated in the contract, is based on a sufficient consideration.

Where the county calls a witness who testifies that the architect agreed to reduce his commission to either two or two and one-half per cent, but that he could not recall which, the architect should be allowed two and one-half per cent instead of two per cent.

The cost of removal of old buildings and the cost of testing steel, both necessary for the construction work, are properly a part of the cost of the improvement on which the architect is allowed commissions. *Osterling v. Allegheny County*, 458.

CONTRACT—*continued.*

8. *Payment—Accord and satisfaction—Agreement to receive back merchandise—Contemporaneous agreement—Principal and agent—Evidence—Party dead—Agent—Authority—Accepting benefits—Estoppel—Hearsay—Harmless error—Delay—Act of May 23, 1887, P. L. 158.*

A vendee's payment for such part of the merchandise as he has resold, accompanied by an offer to return the balance, does not constitute an accord and satisfaction.

It is proper to admit in evidence a contemporaneous agreement made in connection with a sale of merchandise by which the vendor agreed to accept a return of the portion of the goods which the vendee was unable to sell.

Where such an agreement is made by an agent, and the vendor confirms it, and retains the benefit thereof, he cannot repudiate the agent's authority to make the agreement.

In such case, the vendee is a competent witness, although the agent is dead, to testify to the oral agreement, inasmuch as the agent was not a party to the thing or contract in action, although he represented the vendor. The Act of May 23, 1887, P. L. 158, does not apply.

Where a vendor confirmed an order taken by an agent, and retained the benefit thereof, it cannot repudiate his authority to make the alleged oral agreement.

It is error for the court to admit in evidence complaints of the goods made in statements by persons who had purchased them from defendants. Such evidence is mere hearsay.

Where the quality of the goods is put in issue by the statement of claim and the affidavit of defense, the vendor cannot contend that the admission of hearsay evidence was harmless error for the reason that the vendees were precluded from interposing the quality of the goods as a defense, because of the long delay in returning or offering to return them. **Danish P. Milk P. Co. v. Marcus**, 340.

9. *Promissory notes—Payment—Evidence—Prejudicial use of evidence—Cross-examination.* **Stybr v. Walter**, 262.

10. *Sale—Evidence—Parol evidence—Capacity of cars.*

Where a seller of molasses states in a letter that he is carrying for the purchaser "100 tank cars" of molasses "for shipment in our cars," and plaintiff claims that his own cars held 5,000 gallons each, defendant may show, as measuring the amount of the purchase, that the usual tank cars contained 8,000 gallons, and that cars of this capacity had been orally agreed upon between the parties. **Duff v. Hamlin**, 245.

CONTRACT—continued.**11. Sale of land—Conditions—Sale of stock of corporation—Costs divided.**

Where a land company enters into an agreement to sell land, and in the agreement covenants that it will assist the purchaser "in obtaining subscriptions to twenty thousand shares of stock" of a company organized to take over the land and build thereon a manufacturing plant, and it appears that the plant could not be established on the land unless the money was raised by the sale of the stock, the condition is not fulfilled if the parties fail to obtain subscriptions for all the twenty thousand shares.

In such case assistance by the land company in the sale of part of the twenty thousand shares is not a compliance.

In this case the costs were divided between the parties. **Munroe v. Reliance Land Co., 464.**

12. Sale—Nonperformance—Difficulty of performance—Limited quantity in market—Damages—Measure of damages—Sales Act of May 19, 1915, P. L. 543, 562.

If a party, seeking to secure all the merchandise of a certain character which he could obtain, enters into a contract for a quantity of such goods, and subsequently makes performance of the contract by the seller more difficult by making other purchases which increase the scarcity of the available supply, his conduct, in the absence of any intent to embarrass or interfere with the seller, will furnish no excuse to the latter for refusal to perform the contract. Mere difficulty of performance will not excuse a breach of contract.

Where there is an available market in which to procure goods that were not delivered, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market price at the time and place for delivery, or, if no time was fixed, then at the time of the refusal to deliver, as provided by the Sales Act of May 19, 1915, P. L. 543, 562.

If the vendee procures the goods elsewhere, at less than the market value, his measure of damages is limited to the amount he expended therefor in excess of the contract price.

If, however, he resells the goods, the price, on the resale, is not to be taken as the basis for damages for the breach of delivery, unless made part of the contract. **Iron T. Products Co. v. Wilkoff Co., 172.**

13. Sale—Payments—Inconsistent recoveries—Election of remedy—Principal and surety.

CONTRACT—*continued.*

Where a contract provides that payments for merchandise delivered shall be made from time to time, the title thereto to remain in the payee until a certain amount has been paid, and the latter thereafter retakes possession of the property, his right to receive future payments at once ceases.

This rule is applicable though suit to recover the payments was begun before the property was taken by the payee.

A litigant who is entitled to either one of two inconsistent recoveries, cannot by his order of procedure obtain the right to both.

He who elects to disaffirm a contract, and acts upon his election, cannot afterwards affirm it to the injury of another; this is particularly true where the latter is a surety. **Star Drilling Machine Co. v. Richards**, 383.

14. *Sale by periodical deliveries—By-product of plant—Incorporation of vendors—Assignment—Personal qualities of vendors—Mutuality—Assignability—Pleadings.*

Where two partners enter into a contract for the sale of an entire by-product of their plant for a year, and thereafter incorporate their business, the purchaser cannot rescind the contract, on the ground that it was for services of a personal nature and not assignable, if it appears that the production did not depend on the personal skill or ability of any one person, that the business was continued under the same general management, with the same employee and the identical plant equipment, and that no question of credit was involved.

As the subject-matter of the sale was the production for a whole year, and as this could be definitely ascertained, the contract did not lack mutuality.

Where, in such case, suit is brought on the contract in the name of one of the partners trading under the firm name to the use of the corporation, and this is subsequently amended by adding the name of the other partner to that of his copartner, the defendant cannot claim that recovery could only be had, under the pleadings, for the material produced by the partnership, excluding that produced by the corporation.

The rights of plaintiffs under the contract accrued or to accrue were assignable, and the liability of defendant thereunder could not be split up in different actions. A judgment thereon would protect defendant from another suit for the same cause of action. **Walker v. Mason**, 315.

CONSTITUTIONAL LAW.

1. *Titles of act—Amending Act—Acts of June 27, 1913, and July 6, 1917—Municipalities—Boroughs—Annexation—Cities of the third class.*

If the title of an act does not fairly give notice of the contemplated legislation, so as to reasonably lead to inquiry as to what is contained in the body of the bill, section 3, of article III, of the Constitution is violated, and the legislation in regard to it must fall.

Where the title of an amending act quotes the title of the act to be amended, the courts, in considering the sufficiency of the title of the supplementary act, must treat the part quoted as a part of the title of the later act.

The title of the Act of July 6, 1917, P. L. 751, which amended section 1, article III, of the Third Class City Act of June 27, 1913, P. L. 568, is insufficient, because it fails to give notice of the provision requiring a borough council to pass an appropriate ordinance asking annexation when three-fifths of the taxable inhabitants so request. The amending act is therefore unconstitutional.

The act attempts, not to regulate what the cities of the third class may do in the matter of increase of limits, but to impose an entirely new obligation upon municipalities of an entirely different class, such as boroughs. **Com. ex rel. v. Dale Boro.**, 189.

CONTRIBUTORY NEGLIGENCE.

1. *Automobiles—Infant near school—Crossings—Conflicting evidence—Case for jury—Res ipsa loquitur. Rankin v. Ward Baking Co.*, 108.

2. *Negligence—Affidavit of defense—Facts not denied admitted—Practice, C. P.—Act of May 14, 1915, P. L. 483—Evidence—Damages. Gillespie v. Penna. Co.*, 393.

3. *Negligence—Custom—Evidence—Moving cars—Sudden danger. Brown v. Am. Steel Foundries*, 231.

4. *Negligence—Employee of independent contractor—Moving crane—Warning—Notice—Master and servant—Case for jury. Craig v. Riter Conley Mfg. Co.*, 219.

5. *Negligence—Railroads—Crossings—"Stop, look and listen"—Judgment on record—Act of April 20, 1811, P. L. 70. Sakall v. B. & O. R. R.*, 89.

6. *Negligence—Railroads—Joint use of tracks by two companies—Death—Case for jury—Anticipating negligence—Judgment n. o. v. Hastings et al. v. So. Shore R. R.*, 212.

CONTRIBUTORY NEGLIGENCE—*continued*.

7. *Negligence—Sidewalk—Ice and snow—Knowledge of unsafe condition—Choice of two ways. Nolan v. Pittsburgh, 217.*

CONVERSION.

1. *Wills—Decedents' estates—Deficiency of personal assets—Real estate—Payment of insurance—Creditors—Failure to establish lien—Conversion—Necessity. Reel's Est., 185.*

CORPORATIONS.

1. *Penal statutes—Failure of directors to file reports—Conflict of laws—Comity—"Full faith and credit" clause of Federal Constitution.*

A penal statute is one which imposes a penalty or forfeiture for transgressing its provisions, or for doing a thing prohibited, and it is none the less a penal statute because it is also remedial. Such statutes are not enforced outside of the states enacting them.

The liability of directors of a corporation to file reports, is penal, and as a rule will not be enforced by courts of other states.

A statute of Colorado providing that, if a corporation shall fail to file an annual report within a specified time, the directors and officers shall be liable for all debts of the company contracted during the preceding year, is penal in character, and will not be enforced by the Pennsylvania courts against directors resident in Pennsylvania.

Such an act being hard and severe should be construed with great strictness.

If a Colorado court has, under a given state of facts, held it to create a contractual liability, and not to impose a penalty, the courts of another state, when called upon to enforce the statute, should not so construe it, unless the facts are substantially the same.

The Pennsylvania courts will not follow a decision of the Colorado Supreme Court construing the act not to be penal, where all the preceding cases in the same court have held it to be penal, and the wording of the act itself shows the penal character, if the decision in question makes no attempt to distinguish the preceding cases, or to overrule them, makes no mention of the legislative interpretation of the act, and the facts in the case are not similar to those in the Pennsylvania suit.

A foreign court is not bound to apply the doctrine of comity where the highest court of the other state has given different

CORPORATIONS—*continued.*

constructions to its statutes at different times and rights have been acquired under the former construction.

The "full faith and credit" clause of the Constitution of the United States is not to be confused with the rule relating to the construction of statutes by comity so as to conform to the ruling of the highest court of the state which enacted the statute.

In the former, a state court is bound to recognize a judgment of another state; in the latter, where a judgment is not directly involved, the courts of a sister state will, by comity, under similar facts, and where the course of decisions has been uniform, adopt the decision of the highest tribunal of the state enacting the statute as to the construction to be given the act. **Nesbitt v. Clark**, 161.

2. *Taxation—Personal property tax—Foreign corporations—Tangible property—Registration—Doing business—Acts of June 17, 1913, P. L. 507 and July 15, 1919, P. L. 948—Failure to make return. McMullin's Est.*, 284.

3. *Taxation—Personal property tax—Tax on capital stock—Foreign corporations—Holding companies—Registration—Doing business—Words and phrases—Tangible assets—Assessment by auditor general—Act of June 17, 1913, P. L. 507 and July 15, 1919, P. L. 948—Failure to make return—Penalty—Remission. Callery's App.*, 255.

CRIMINAL LAW.

1. *Appeals—Assignments of error—Murder—Confession. Com. v. Patterson*, 522.

2. *Murder—Evidence—Duty of appellate court to review the evidence—Act of Feb. 15, 1870, P. L. 15.*

Under the Act of February 15, 1870, P. L. 15, it is the duty of the Supreme Court, on an appeal from a conviction of murder, to review both the law and the evidence, and determine whether the ingredients necessary to constitute first degree murder have been proved to exist.

If there is competent evidence to support the verdict, the appellate court cannot usurp the functions of the jury and reverse merely because it might be contended they should not have believed the witnesses produced on behalf of the Commonwealth.

The evidence in this case examined and held to be sufficient to sustain a conviction of murder of the first degree. **Com. v. Priest**, 549.

CRIMINAL LAW—continued.

3. Murder—New trial—After-discovered evidence—Credibility of witness—Act of April 22, 1803, P. L. 245.

Where, after a conviction of murder of the first degree, a motion for a new trial is filed, and defendant is given fifteen days to file affidavits and depositions in support of his motion, which he fails to do, and seven weeks later a new trial is refused, defendant is not entitled to a rehearing in the absence of any explanation of his failure to take advantage of the previous opportunity given him.

After-discovered evidence having for its purpose only the impeachment of the credibility of witnesses, furnishes no sufficient reason for a new trial.

Where there is positive evidence that the deceased was shot with a revolver containing shells of a certain size, and that the revolver was wrenched from defendant at the time, after-discovered evidence that defendant also possessed other and larger shells, is insufficient upon which to base an application for a new trial.

In such case the Supreme Court will not enter an order for additional inquiry by the court below as provided by the Act of April 22, 1903, P. L. 245, even if a petition had been presented to the Supreme Court in the manner provided by the act, which was not done. **Com. v. Carter**, 551.

4. Murder—New trial—After-discovered evidence—Discretion of court.

The Supreme Court will not, in a murder case, reverse the action of the court below in refusing a new trial, except in case of a manifest abuse of discretion.

Where the application for a new trial is based on after-discovered evidence, the refusal of a new trial will be sustained, where it appears that the so-called after-discovered evidence, might have been produced at the trial, that it related to very trivial matters, not vital to the case, and that it should not and probably would not result in a different verdict. **Com. v. Patterson**, 522.

DAMAGES.

1. Evidence—Contradiction of witness by physical facts—Case for jury—Mines and mining—Unlawful mining of coal—Statement of claim—Act of May 8, 1876, P. L. 142. Fuher v. Westmoreland Coal Co., 14.

2. Negligence—Evidence—Experts—Opinion—Disease result of injury—Loss of earning power. Zimmerman v. Weinroth, 537.

DAMAGES—continued.

3. *Foreign attachment—Plaintiff attaching money in his own hands—Quashing writ—Irregularity in record—Res adjudicata—Measure of damages for breach of warranty—Acts of April 26, 1917, P. L. 102 and April 18, 1919, P. L. 72—Appeals—Practice—Questions not raised below. Pasquinelli v. Southern Macaroni Mfg. Co., 468.*

4. *Practice, equity—Pleadings—Proofs—Decree. Reilly v. Magee, 406.*

5. *Negligence—Affidavit of defense—Facts not denied admitted—Practice, C. P.—Act of May 14, 1915, P. L. 483—Evidence—Contributory negligence. Gillespie v. Penna. Co., 393.*

6. *Negligence—Railroads—Excessive verdict—Abuse of discretion—Act of May 20, 1891, P. L. 101—Review. Stevenson v. Davis, 361.*

7. *Negligence—Railroads—Master and servant—Safety appliance—Defect—Federal Act of March 21, 1893—Coupling cars—Contributory negligence—Case for jury—Verdict—Excessive verdict. Crumley v. Penna. R. R., 226.*

8. *Negligence—Insurance. Pittsburgh F. & I. Co. v. Dravo Contracting Co., 118.*

9. *Negligence—Injuries to minor child—New trial—Discretion of court—Abuse—Appeal. Rankin v. Ward Baking Co., 106.*

10. *Timber—Unlawful cutting—Trespass—Possession—Adverse possession—Residence—Cultivation. Kossell v. Rhoades, 75.*

11. *Mines and mining—Surface support—Release—Damages—Covenants—Injury to water supply—Drilling well for water—Care of well—Negligence—Evidence—Presumption—Equity maxim—Sic utere tuo. Householder v. Quemakoning Coal Co., 78.*

DEATH.

1. *Evidence—Witness—Competency of witness. Wood's Est., 8.*

2. *Negligence—Railroads—Joint use of tracks by two companies—Case for jury—Contributory negligence—Anticipating negligence—Judgment n. o. v. Hastings v. So. Shore R. R., 212.*

3. *Workmen's compensation—Death on houseboat—Jurisdiction—Admiralty—Navigable waters—Landing—Findings of compensation board—Workmen's Compensation Act. Lawton v. Diamond Coal & Coke Co., 74.*

DEATH—continued.

4. *Workmen's compensation—Injury—Reduction of payments—Widow—Act of June 23, 1919, sec. 306, P. L. 642. Napp v. Estep Bros. C. M. Co., 159.*

5. *Workmen's compensation—Tuberculosis—Injury as contributory cause—Opinion of medical experts—Evidence—Hypothetical question. Kelly v. Watson Coal Co., 39.*

DECEDENTS' ESTATES.

1. *Claims paid by executor—Preservation of estate—Fund raised by sale of real estate—Rents—Unsecured creditors—Act of June 7, 1917, P. L. 447.*

Where executors have paid taxes, interest on mortgage, and a judgment, in order to preserve the estate, they are entitled to be reimbursed out of the proceeds of real estate, sold more than a year after testator's death, in the absence of sufficient personal assets, although they have taken no steps to establish a lien on the real estate.

Rents collected by the executors under authority of the Act of June 7, 1917, section 14, P. L. 447, are assets for the payment of unsecured creditors having no lien on the real estate. *Reel's Est., 139.*

2. *Counsel fees—Settling estate—Fees for services rendered prior to death—Evidence—Judicial notice.*

The allowance for services of counsel in settling an estate is largely a matter for the court below.

An allowance of such fees by the court below will be approved, where it does not disclose an abuse of discretion, nor violate the rule that counsel fees can only be allowed for services beneficial to the estate, and not for such as were rendered for individual benefit.

The orphans' court, in settling an account of an executor, who was also decedent's attorney, commits error in allowing a claim for legal services rendered in decedent's lifetime, without any evidence being offered as to the value of such services.

In such case the court cannot take judicial notice of the value of the services. *Wood's Est., 8.*

3. *Intestate laws—Representation among collaterals—First cousins—Second cousins—Acts of April 8, 1833, P. L. 316; April 27, 1855, P. L. 368; June 30, 1885, P. L. 251; May 25, 1887, P. L. 261, and June 7, 1917, P. L. 429.*

Under the Act of June 7, 1917, P. L. 429, where an intestate leaves no nearer kindred than first cousins and second cousins, the latter do not share with the former in the distribution of the estate.

DECEDENTS' ESTATES—*continued.*

Where there is a complete default of all those in whom the right of distribution is bestowed by the first nine sections of the act, but there are living three first cousins, children of two deceased aunts, and two second cousins, grandchildren of another deceased aunt, all of whom are descendants of one of the deceased grandparents of the intestate, the first cousins take to the exclusion of the second cousins.

By linking together the 10th, 11th and 19th sections of the Act of 1917, and considering the 12th, the proper construction is reached that, when there is no living grandparent, and first cousins of the intestate survive him, second cousins, also surviving, are not next of kin (nearest blood relations), nor can they take by representation; hence they do not take at all.

The Act of 1917 was not intended to change existing law and set up representation among collaterals generally.

Section 10 of the act merely introduces the idea, in a general way, of who, in default of the nearer kindred provided for in the earlier sections, may inherit; it does not undertake to specify under what conditions the surviving grandparents, or the descendants of dead grandparents, respectively, shall take, or in what proportions; that is left to section 12, which fully covers the ground.

The legislation from 1833 to 1917 on the subject of representation among collaterals, considered and explained. *Miles's Est.*, 329.

4. *Marriage—Proof of—Cohabitation and reputation—Illicit intercourse—Presumption—Claim of alleged widow of decedent—Husband and wife—Decedents' estates—Evidence—Findings of fact—Orphans' court—Appeals.* *Stevenson's Est.* 291.

5. *Ownership of personal property—Widow—Review—Executors and administrators—Gifts—Evidence—Estoppel.*

Where a widow claims household goods and paintings as her own property at the time of the inventory of her husband's estate, but they are included in the inventory without her knowledge, and the executor's account is audited and decree of distribution made, the household goods and paintings remaining in the widow's possession, the widow is entitled, eleven years after the death of her husband, to a bill of review, and, on such review, if the evidence is sufficient to show that the goods were gifts to the claimant from the husband, she will be entitled to have them awarded to her. In such case the widow is not estopped. *Donnelly's Est.*, 208.

DEED.

1. *Entireties—Estate by entireties—Husband and wife—Effect of divorce—Lease—Division of income—Equity. O'Malley v. O'Malley, 528.*

2. *Parent and child—Conveyance for support—Mental capacity of grantor—Confidential relation—Burden of proof—Evidence—Party dead.*

Where aged parents convey land, under an agreement for support and burial, to an unmarried daughter, who had lived with and cared for her parents during a period of years after her brother and two unmarried sisters had left the common home, and the daughter fulfills her agreement, the burden of proof, in the absence of evidence of fraud, is not on her, after the parents' death, to show that she did not secure the deed by undue influence, or at a time when the grantors were mentally incapable.

Where a brother, after the death of his father and mother, files a bill in equity against a sister for the cancellation of a deed given by his parents to the sister in their lifetime, the brother is an incompetent witness, as to matters occurring in the lifetime of the parents. *Fiscus v. Fiscus, 326.*

DEMURRER.

1. *Trade-mark—Unfair competition—Equity—Injunction—Pleading. B. V. D. Co. v. Kaufmann & Baer Co., 240.*

EJECTMENT.

1. *Boundaries—Uncertainty—Evidence—Case for court—Burden of proof.*

In an action of ejectment the case should not be submitted to the jury where plaintiff's evidence presents no definite or certain limits to the land in controversy, and it would not be possible for a surveyor to locate the boundary lines, or for the jury to describe the property in a verdict.

In such case the burden of proof is on plaintiff to show the property lines. *Seits v. Penna. R. R., 84.*

2. *Practice, C. P.—Judgment on pleadings—Act of June 7, 1915, P. L. 887—Trusts and trustees—Statute of frauds—Act of April 22, 1856, P. L. 532—Evidence. Levy v. Seadler, 366.*

EMINENT DOMAIN.

1. *Railroads—Branch—Public or private use—Burden of proof—Equity—Act of June 19, 1871, P. L. 1360—Bill by private person—Procedural questions—Action of directors—Notice to director general of railroads. Pioneer Coal Co. v. Cherrytree etc. R. R., 43.*

ENTIRETIES.

1. *Estate by entireties—Husband and wife—Effect of divorce—Deed—Lease—Division of income—Equity.*

A title by deed retains the incidents which pertain to it at its inception. Hence a divorce of the parties does not destroy the incidents of an estate by entireties, either as relates to the final disposition of the property or to its income while both parties are alive.

The incidents of an estate by entireties are that the income of the property belongs to each in its entirety and not to one exclusively, and the corpus passes to the survivor unaffected by anything which the decedent may have done.

The right of either spouse to lease a property held by entireties and to collect the rent thereof, is not an incident of such an estate, but only flows from the fact that the parties hold by entireties.

The acts relating to the property of married women do not alter the incidents of an estate by entireties, but since their passage a purchaser of the title of one acquires no right of possession during the life of the other, neither can sell even the expectancy of survivorship, without the joinder of the other, nor can a valid title to the income or expectancy of survivorship of one be obtained by a sheriff's sale or under proceedings in bankruptcy.

After a divorce, unless some other equity has intervened, a court distributing the income of an estate held by entireties, will divide it equally between the parties.

So too the parties, after a divorce, may agree to the disposition of such income, and the agreement will be binding and enforceable.

After a divorce, if one of the parties collects more than an equal portion of the income, the law will imply a promise to pay to the other his or her fair share thereof. *O'Malley v. O'Malley*, 528.

EQUITY.

1. *Accounting for profits—Purchase of coal lands—Joint owners—One party buying out the other—Signature to paper—Modification of paper—Notice—Trust and trustees—Constructive trust—Trustee ex maleficio.*

Where two persons join together in the purchase of coal lands, and the first sells out his interest to the second, and thereafter the latter sells the whole estate in the lands at a profit to a person who had been previously negotiating for them at a price named, but had postponed acceptance, the

EQUITY—*continued.*

second cannot compel his associate to account for half the profits, if it appears that he knew of the pending negotiations, and there is no evidence that, at the time he sold out, an agreement of sale had been made with the final purchaser.

Where, in an equity suit, it appears that plaintiff and defendant were about to enter into an agreement, and that defendant refused to sign a paper unless a change of a word was made therein, and thereupon caused the word to be changed in plaintiff's presence, and plaintiff subsequently caused the paper to be written in its original form, and plaintiff then signed it without being aware that a change had been made, plaintiff was bound to call the attention of defendant to the fact that he had presented a redrawn copy of the agreement in its original form, and, failing to do so, he could not ask a court of equity to assist him in taking advantage of defendant's mistake. **Williamson v. Dawson**, 370.

2. *Appeals—Findings against appellee.*

On an appeal from a decree in an equity suit, the appellee cannot, in order to maintain a decree in his favor, rely on facts which the trial court expressly refused to find. **Pioneer Coal Co. v. Cherrytree, etc. R. R.**, 43.

3. *Equity jurisdiction—Remedy at law—Equity practice—Cloud on title—Demurring and answering at same time—Words and phrases—Sheriff's inquisition—Satisfaction of debt in seven years—Invalid sheriff's sale—Ejectment bill.*

A cloud on title is a title or encumbrance apparently valid, but in fact invalid.

Equity has jurisdiction to remove clouds on titles, and, in a proper case, it will direct the instrument casting the cloud on the title to be delivered up and cancelled.

A defendant may not answer and demur to the whole bill.

An objection to the jurisdiction of a court of equity must be taken, either by demurrer or plea, before answer. By demurring and answering, defendant waives the question of jurisdiction.

Where in a proceeding in equity, plaintiff's title is clear and all the evidence relating to it is of such a character that a judge in a trial at law, upon the same evidence, would not be at liberty to submit the question to the jury, equity will grant relief.

Equity has jurisdiction of a bill in equity for a reconveyance of real estate, and cancellation of a mortgage thereon, where it appears that, under a judgment against plaintiff, a sheriff's inquisition found that the rents, issues and profits of

EQUITY—continued.

the premises, were of a yearly value to satisfy the debt, interest and costs, in seven years, and that, notwithstanding the return, the property was sold and conveyed by the sheriff to one of the defendants, who conveyed to another of the defendants, the latter giving a mortgage for part of the purchase money.

In such case the sheriff's deed, and the subsequent deed and mortgage, were mere nullities and clouds on the title, and equity had jurisdiction to remove them.

The bill, in such case, was not an ejectment bill. If plaintiff had brought his action at law, the mortgagee, in the mortgage given by defendant, would not have been bound by the judgment, and therefore plaintiff's remedy on the law side of the court would not be complete and adequate. **Omerate v. Carlini**, 489.

4. Equity practice—Amendment—Delay in application—Discretion of court—Withdrawing bill.

The allowance of amendments rests in the reasonable discretion of the court, and, in absence of plain error, its action will not be reversed.

The refusal to permit a bill in equity to be amended is amply justified after finding of facts and law had been made, and a decree nisi entered; and particularly is this so if circumstances appear which showed a failure to exercise due diligence in making the application.

One of the plaintiffs in an equity suit will not be permitted to withdraw his bill, after rulings adverse to his contention have been entered. **Berlin S. C. & C. Co. v. Rohm**, 24.

5. Equity practice—Findings of fact—Findings of chancellor reversed by court in banc—Participation of chancellor in final findings—Appeal.

The findings of fact by a chancellor will not be reversed on appeal where based on sufficient competent evidence, and no manifest error appears.

If the court in banc reverses the chancellor, and the chancellor takes part in the hearing on exceptions to his findings, and joins the court in changing his previous findings, the final conclusion of the chancellor is to be treated as his deliberate conclusion, and such findings are subject to the general rule on appeal. **Placentino v. Young**, 556.

6. Practice—Findings of fact—Appeals.

Where there is evidence which sustains a chancellor's findings of fact, the Supreme Court will not reverse except in clear cases. **Orth v. Board of Education**, 411.

EQUITY—*continued.*7. *Equity practice—Pleading—Scope of decree—Accounting—Partnership—Oil lease—Amendment.*

Where a bill in equity prays for an accounting of profits in the operation of an oil lease particularly described, and the court finds that a partnership existed between plaintiff and defendants not only as to such lease, but also as to an adjoining lease, an accounting will only be directed as to the lease mentioned in the bill, inasmuch as the decree must conform to the pleadings.

In such case after a master has been appointed to adjust the rights of the parties, an amendment of the bill will not be allowed, so as to include in the accounting the operations on the adjoining lease.

Even if there had been no adjudication of the matters to be included in the accounting, the court could not amend its decree so as to embrace additional transactions, for there was nothing in the pleadings which justified its broadening. **Rols-house v. Wally**, 506.

8. *Findings of fact—Evidence—Coal lease—Misrepresentations.*

Findings of fact by a chancellor that there were no misrepresentations made by the lessor of coal as to the quality thereof, if based upon sufficient and competent testimony, have the weight of a verdict of a jury, and will not be disturbed, in the absence of manifest error. **Schmidt v. Musser**, 875.

9. *Findings of fact by chancellor—Evidence—Mental capacity to execute deed—Appeal—Review.*

Findings of a chancellor based on sufficient and competent evidence, although contradicted, that a person was mentally capable of executing a deed, will not be reversed on appeal, except for manifest error. **Colwes v. Meyer**, 323.

10. *Judgment—Lease of coal lands—Assumption of judgment—Fraud—Rescission of contract—Findings of fact.* **Berlin Smokeless C. & C. Co. v. Rohm**, 24.11. *Railroads—Eminent domain—Branch—Public or private use—Burden of proof—Act of June 19, 1871, P. L. 1360—Bill by private person—Procedural questions—Action of directors—Notice to director general of railroads.* **Pioneer Coal Co. v. Cherrytree & Dixonville R. R.**, 43.12. *Specific performance—Decree matter of grace—Discretion of court—Findings of fact—Trust relation—Fraud—Evidence.*

EQUITY—continued.

The specific performance of a contract is within the discretion of the court below, it being a matter of grace, and not of right; and the findings of a chancellor thereon, if supported by evidence, have the weight of a verdict of a jury, and will not be reversed unless clear error appears on the record.

A decree for the specific performance of the sale of the real estate of a decedent to one of five heirs by the other four, will be sustained, where defendants offered evidence that plaintiff had occupied a position of confidence by reason of his having previously managed the land, and that he had made false statements as to value, but this evidence is contradicted and the court below found on sufficient evidence that plaintiff had not managed the land, and had made no false representations, and that the contract price approximated the market value of the land. **Volk v. Volk**, 378.

13. *Specific performance—Time—Essence of contract—Waiver—Agreement as to new time of settlement—Tender.*

Specific performance of a contract for the sale of real estate, where time is of the essence of the contract, will not be enforced if there has been a failure of the vendee to comply with the obligation assumed within the time limit.

This rule is subject to the limitation that the parties may by their actions surrender the right to demand strict compliance.

If this right has been waived, and a new time fixed, the vendee may perform, or offer to do so, until the expiration of the new date.

Where one additional day has been allowed by the vendor, he cannot withdraw until the end of that day. If he does so he will be in default, and the vendee no longer needs to make a strict legal tender. All that will be required of him thereafter is proof of a readiness and willingness to perform.

If the vendor has named a depository, the vendee has fully performed, if he has paid what was due, to the depository. **Piacentino v. Young**, 556.

ESTOPPEL.

1. *Contracts—Payment—Accord and satisfaction—Agreement to receive back merchandise—Contemporaneous agreement—Principal and agent—Evidence—Party dead—Agent—Authority—Accepting benefits—Hearsay—Harmless error—Delay—Act of May 23, 1887, P. L. 158. Danish Pride Milk Products Co. v. Marcus*, 340.

ESTOPPEL—continued.

2. *Decedents' estates—Ownership of personal property—Widow—Review—Executors and administrators—Gifts—Evidence.* **Donnelly's Est.**, 208.

3. *Insurance—Fire insurance—Prohibition of other insurance—Waiver—Authority of agent.* **Russell v. Farmers Mut. F. Ins. Co.**, 1.

EVIDENCE.

1. *Accord and satisfaction—Performance—Agreement to accept promise in satisfaction—Consideration—Written evidence—Law for court.* **Meaker Galvanizing Co. v. McInnes**, 561.

2. *Admissibility of—Items claimed established by verdict—Appeals—Contract.*

Objection to the admissibility of evidence as to certain items claimed, is untenable on appeal, where the verdict establishes that the contract, covering such items, was in truth entered into by the parties. **Phila. B. & W. R. R. v. Perna**, 569.

3. *Appeals—Statement of questions involved.* **Glockner v. Penna. R. R.**, 312.

4. *Appeals—Exceptions.* **Pittsburgh F. & I. Co. v. Dravo Contracting Co.**, 118.

5. *Contract—Sale—Parol evidence—Capacity of cars.* **Duff v. Hamlin**, 245.

6. *Contradiction of witness by physical facts—Case for jury—Mines and mining—Unlawful mining of coal—Statement of claim—Damages—Act of May 8, 1876, P. L. 142.*

Where the apparent weight of the evidence on a disputed fact is overwhelming, still, if there is countervailing evidence of it upon which the jury may make a finding, all the evidence must be for their consideration.

Exceptions to this rule have been made in cases where testimony stands opposed to physical facts admitted, or the evidence thereof is of such conclusive and unimpeachable nature as to amount to an admission.

While an appellate court may not be authorized to weigh evidence and pass upon disputed facts, it should use its judicial knowledge to bring about justice, and, where undisputed physical facts are clearly shown and it is demonstrated by the law of nature, by mathematics or the like that a finding is untrue and cannot be true, the appellate court is justified in reversing the trial court.

In an action to recover damages for the unlawful mining of coal, where the only evidence for plaintiff is that of one witness who testified that he crossed into plaintiff's land while

EVIDENCE—*continued.*

mining coal for defendant, the case must go to the jury, although such testimony was in conflict with defendant's mine map.

Where, in an action to recover damages for unlawful mining of coal, the statement as a whole claims compensation for the coal taken and damages to the overlying surface, although it specifically claims double and treble damages under the Act of May 8, 1876, P. L. 142, the statement is sufficient upon which to ground the action for compensation. **Faher v. Westmoreland Coal Co.**, 14.

7. *Contracts—Payment—Accord and satisfaction—Agreement to receive back merchandise—Contemporaneous agreement—Principal and agent—Party dead—Agent—Authority—Accepting benefits—Estoppel—Hearsay—Harmless error—Delay—Act of May 23, 1887, P. L. 158.* **Danish Pride Milk Products Co. v. Marcus**, 340.

8. *Criminal law—Murder—New trial—After-discovered evidence—Credibility of witness—Act of April 22, 1903, P. L. 245.* **Com. v. Carter**, 551.

9. *Criminal law—Murder—Duty of appellate court to review the evidence—Act of Feb. 15, 1870, P. L. 15.* **Com. v. Priest**, 549.

10. *Decedents' estates—Counsel fees—Settling estate—Fees for services rendered prior to death—Judicial notice.* **Wood's Est.** 8.

11. *Deed—Parent and child—Conveyance for support—Mental capacity of grantor—Confidential relation—Burden of proof—Party dead.* **Fiscus v. Fiscus**, 326.

12. *Ejectment—Boundaries—Uncertainty—Case for jury—Burden of proof.* **Seitz v. Penna. R. R.**, 84.

13. *Equity—Findings of fact by chancellor—Mental capacity to execute deed—Appeal—Review.* **Colwes v. Meyer**, 323.

14. *Equity—Specific performance—Decree matter of grace—Discretion of court—Findings of fact—Trust relation—Fraud.* **Volk v. Volk**, 378.

15. *Findings of fact — Coal lease — Misrepresentation.* **Schmidt v. Musser**, 375.

16. *Insurance—Livestock insurance—Loss of hogs by carrier—Proofs of loss—Waiver—Stockyard books—Best evidence—Identification of handwriting—Bill of lading—Acceptance of limited bill of lading.* **Wm. Zeller Co. v. Hartford Fire Ins. Co.**, 386.

EVIDENCE—continued.

17. *Marriage—Proof of—Cohabitation and reputation—Illicit intercourse—Presumption—Claim of alleged widow of decedent—Husband and wife—Decedents' estates—Findings of fact—Orphans' court—Appeal. Stevenson's Est.*, 291.

18. *Mines and mining—Surface support—Release—Damages—Covenants—Injury to water supply—Drilling well for water—Care of well — Negligence — Presumption — Equity—Maxim—Sic utere tuo. Householder v. Quemahoning Coal Co.*, 78.

19. *Negligence—Damages—Experts—Opinion—Disease result of injury—Loss of earning power. Zimmerman v. Weinroth*, 537.

20. *Negligence—Piling boards in street—Case for jury—Infants. Sheplan v. Kramer Woodworking Co.*, 518.

21. *Negligence—Injuries—Expert testimony. Sullivan v. B. & O. R. R.*, 429.

22. *Negligence—Railroads—Interstate commerce—Federal Employers' Liability Act of April 22, 1908, 35 Stat. 65, ch. 149—Brakeman—Defective appliance—Case for jury—Happening of accident—Res ipsa loquitur. Sullivan v. B. & O. R. R.*, 429.

23. *Negligence—Affidavit of defense—Facts not denied admitted—Practice, C. P.—Act of May 14, 1915, P. L. 483—Damages—Contributory negligence. Gillespie v. Penna. Co.*, 393.

24. *Negligence—Custom—Moving cranes — Contributory negligence—Sudden danger. Brown v. Am. Steel Foundries*, 231.

25. *Negligence—Statement—Allegata and probata—Amendment — Surprise—Waiver continuance—Appeal—Proximate cause—Fire—Oil on river—Things to be naturally anticipated—Act of God or vis inertia. Pittsburgh F. & I. Co. v. Dravo Contracting Co.*, 118.

26. *Origin and history of transaction—Contract.*

Where evidence tends to make the fact in issue more or less probable, or shows the origin and history of the transaction between the parties, and explains its character, it is material. *Phila., B. & W. R. R. v. Perna*, 569.

27. *Practice, C. P.—Trial—Demonstration of another person's wounded hand. Pinter v. Baker*, 541.

28. *Promissory notes—Payment—Contract—Prejudicial use of evidence—Cross-examination. Styhr v. Walter*, 202.

29. *Trusts and trustees—Agent taking property in his own name—Right to damages for injury to property by change of*

EVIDENCE—*continued.*

grade—Parol promise—Act of April 22, 1856, P. L. 532—Memorandum in writing—Witness—Failure to object to evidence at trial—Waiver—Appeals. Christian Moorlein Brewing Co. v. Busch, 181.

30. *Wills—Probate—Codicil—Proof of contents—Act of June 7, 1917, P. L. 403. Lawman's Est., 237.*

31. *Witness—Competency of witness—Death.*

Where an executor is first called as a witness, by one excepting to his account, and cross-examined at large as to matters occurring before and after the death of the testatrix, he is made competent for all purposes.

When he is recalled upon his own behalf, and no objection is made to his competency, his testimony is properly before the auditing judge, and exception thereto is without merit. *Wood's Est., 8.*

32. *Witness—Competency of witness—Death. Wood's Est., 8.*

33. *Workmen's compensation—Death—Tuberculosis—Injury as contributory cause—Opinion of medical experts—Hypothetical question. Kelly v. Watson Coal Co., 39.*

EXCEPTIONS.

1. *Workmen's Compensation—Fact and law—Remitting record. Callihan v. Montgomery, 56.*

EXECUTION.

1. *Sheriff's sale—Distribution—Subrogation—Judgment—Maxims—In fictione juris, etc.*

In distributing a fund realized at sheriff's sale, the party entitled thereto must make his own claim and must himself appeal, if the decision be against him; one to whose right he claims to be subrogated, but who has no personal interest, cannot properly claim the fund or appeal from the decree of distribution.

The court of common pleas, by virtue of whose process a sale is had, is required to determine what amount is due on judgments alleged to be entitled to any part of the proceeds, even though they may have been entered originally in the courts of some other county.

All such distributions must be made according to law and equity, hence the fund cannot be awarded to one not equitably entitled to receive it.

One who alleges he is entitled to subrogation, must show that in equity and good conscience it should be allowed. *Donnan v. Barnes, 33.*

EXECUTORS AND ADMINISTRATORS.

1. *Trusts and trustees—Duties—Liabilities.*

All that a court of equity requires from trustees is common skill, common prudence and common caution. Executors, administrators or guardians are not liable beyond what they actually receive, except in case of gross negligence or wilful default. **Wood's Est.**, 8.

FICTITIOUS NAME.

1. *Trading under—Partnership—Act of June 28, 1917, P. L. 645.*

Where two members of a partnership have traded for forty-six years under the name of "W. & H. Walker," and it appears that the same partnership name was used by the partner's uncle and father, who founded the business, and had identically the same names as the son and nephew, the use of the firm name by the latter is not a violation of the Act of June 28, 1917, P. L. 645, forbidding trading under a fictitious name.

The fact that one of the partners added the word "Junior" to his name is immaterial.

Where the name indicates the actual ownership of the business, a contract will be enforced.

Partnerships openly using the true names or surnames of their members in their firm name in such manner as to fairly advise of the parties owning or conducting the business and not to mislead, are not to be regarded as under false, assumed or fictitious names. **Walker v. Mason**, 315.

FINDINGS OF FACT.

1. *Church law—Inactive or extinct church—Appointment of trustee—Appeal—Act of June 5, 1913, P. L. 435—April 18, 1919, P. L. 72, May 17, 1921, P. L. 861—Cemeteries—Burial ground—Sale. Mt. Calvary Methodist Protestant Church Trustee*, 453.

2. *Equity — Evidence — Coal lease — Misrepresentation. Schmidt v. Musser*, 375.

3. *Equity—Practice—Appeals. Reilly v. Magee*, 406.

4. *Equity—Specific performance—Decree matter of grace—Discretion of court—Trust relation—Fraud—Evidence. Volk v. Volk*, 378.

5. *Judgment—Lease of coal lands—Assumption of judgment—Fraud—Rescission of contract—Equity. Berlin Smokeless C. & C. Co. v. Rohm*, 24.

6. *Marriage—Proof of—Cohabitation and reputation—Illicit intercourse—Presumption—Claim of alleged widow of dece-*

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FINDINGS OF FACT—*continued.*

dent—Husband and wife—Evidence—Findings of fact—Orphans' court—Appeal. Stevenson's Est., 291.

FOREIGN ATTACHMENT.

1. *Affidavit of cause of action—Sales—Contract.*

An affidavit of cause of action in a proceeding in foreign attachment, must set out a good cause of action, and such facts as give the court jurisdiction, and must not be ambiguous or depend on conjecture or inference.

Where the suit is based on a contract of sale of goods, which particularly describes the goods, and manner of packing and delivery and the place of delivery, plaintiff must aver in his affidavit that he made or tendered delivery in accordance with the letter of the contract, setting out the terms and methods of compliance in detail.

If plaintiff avers a refusal to accept goods, he must give the facts relating to the refusal, and state whether it was oral or written. **McLeod v. Hyman**, 582.

2. *Dissolution—Appearance—Agreement of counsel—Practice, C. P.*

Where the docket entries in a foreign attachment proceeding show the entry of a rule to show cause of action and to dissolve, followed by the entry, "Rule discharged by agreement," the use of the words quoted, will not bar the court from subsequently vacating the discharge, and dissolving the attachment.

The use of the word "agreement" in the entry without anything on the record to show its meaning, will not be construed to mean that defendant had appeared by counsel, and that therefore all the parties were in court, and the purpose of the attachment had been served.

While the assent of the court to agreement of counsel affecting the proceedings, is assumed until its dissent therefrom is indicated, yet the court can always refuse to sanction such agreement, when right and justice require; and, to reach these ends, it had the power to change what appears upon the record as a prior ruling, particularly where it is done within the term. **Delaney v. Phila. C. & I. Co.**, 578.

3. *Plaintiff attaching money in his own hands—Quashing writ—Irregularity in record—Res adjudicata—Measure of damage for breach of warranty—Acts of April 26, 1917, P. L. 102, and April 18, 1919, P. L. 72—Appeals—Practice—Questions not raised below.*

FOREIGN ATTACHMENT—*continued.*

The plaintiff in foreign attachment may attach money in his own hands, but, if for any sufficient reason the attachment can be shown to be void in law, it may be quashed.

As a general rule writs of foreign attachment will not be quashed unless some fundamental irregularity appears in the record itself, and cases where this principle has been departed from will be found to present unusual features, which distinguish them from the rule as stated.

A motion to dissolve a foreign attachment is the proper practice, where the suit may remain as a pending action notwithstanding defects in the record.

A motion to quash the writ is proper, where the defects depended on are fundamental in character and such as put plaintiff completely out of court.

Facts which will support a motion to quash the writ will sustain one to dissolve the attachment, but the reverse is not always true.

An applicant to quash a writ may not aver simply a defense on the merits, or a good legal answer to the alleged debt itself, he must point to some defect in the record which renders the proceeding fundamentally irregular and void.

If the most that is averred is a defense on the merits, or simply a good legal answer to the alleged debt itself, such a defense must be developed at the trial, unless an agreement on the facts, or something tantamount thereto, appears, which shows a case so fully developed that, if on trial, it would require binding instructions for defendant.

Under the Acts of April 26, 1917, P. L. 102, and April 18, 1919, P. L. 72, the appellate court, on appeals from orders on motions to quash or dissolve foreign attachments, will examine the proofs to see if there is any evidence to warrant the findings of the trial court or to sustain the action complained of; but, in making such examination, the prevailing presumption "that everything was done rightly and according to law," still holds.

As the Act of 1917 allows an appeal from the refusal to quash a writ, which is an interlocutory order, the usual rule governing such orders applies, and the record must present plainly a clear abuse of discretion, before a reversal can be had.

Where a writ of foreign attachment is quashed the record showing such action must be self-sustaining.

FOREIGN ATTACHMENT—*continued.*

On an appeal from an order refusing to quash a writ of foreign attachment, a question not raised in the lower court will not be considered.

Measure of damages for breach of warranty as to quality of personal property, not decided, because not properly raised.

On such appeal, where it appears that defendant claimed the case was *res adjudicata* by a prior suit between the same parties in another court, the appellate court will not pass on this question if it appears the record of the proceedings in the other court was not made part of the record in the case appealed.

Not only the pleadings but also the stenographer's notes of the first trial must be given in evidence in the second before the question of *res adjudicata* can be reviewed. **Pasquinelli v. So. Macaroni Mfg. Co.**, 470.

FOREIGN CORPORATIONS.

1. *Taxation—Personal property—Corporations—Foreign corporations—Tangible property—Registration—Doing business—Act of June 17, 1913, P. L. 507 and July 15, 1919, P. L. 948—Failure to make return. McMullin's Est.*, 284.

FRAUD.

1. *Contract—Building contract—Architect's certificate—Nonperformance. Biset v. Smith*, 31.

2. *Equity—Specific performance—Decree matter of grace—Discretion of court—Findings of fact—Trust relation—Evidence. Volk v. Volk*, 378.

3. *Judgment—Lease of coal lands—Assumption of judgment—Rescission of contract—Equity—Findings of fact. Berlin Smokeless C. & C. Co. v. Rohm*, 24.

4. *Practice, C. P.—Affidavit of defense—Insufficient averment. Meaker Galvanizing Co. v. McInnes*, 561.

GIFT.

1. *Decedents' estates—Ownership of personal property—Widow—Review—Executors and administrators—Evidence—Estoppel. Donnelly's Est.*, 208.

HUSBAND AND WIFE.

1. *Entireties—Estate by entireties—Effect of divorce—Deed—Lease—Division of income—Equity. O'Malley v. O'Malley*, 528.

HUSBAND AND WIFE—continued.

2. *Wills—Construction—Agreement of legatees as to construction of will—Widow's election—Estoppel—Married women—Control of general property—Act of June 8, 1893, P. L. 344. Fitzgibbon's Est., 345.*

INJUNCTION.

1. *Trade-mark—Unfair competition—Equity—Injunction—Pleading—Demurrer. B. V. D. Co. v. Kaufmann & Baer Co., 240.*

INSURANCE.

1. *Fire insurance—Prohibition of other insurance—Estoppel—Waiver—Authority of agent.*

Where an insurance company delivers a policy of fire insurance to the insured knowing of the existence of other insurance on the premises, the company waives a condition in the policy that, if there is other insurance, the policy shall be void; and this is so though no waiver is endorsed on the policy.

An agent of an insurance company who has authority or power to consent to additional insurance, and, at the time he writes and delivers a policy, has knowledge that the insured has other insurance on the same property, his knowledge binds the company, in the absence of fraud, and the company is estopped to claim the invalidity of the policy on such grounds, notwithstanding any provisions to the contrary.

Where a fire policy provides that it shall be void if the insured had other insurance, and the agent, with proper authority, delivers the policy with knowledge of other insurance on the same premises, such policy is a valid policy of insurance rendering void a previous policy in another company, which provided that "insuring in any other company will make insurance null and void in this." *Russell v. Farmers Mut. F. Ins. Co., 1.*

2. *Livestock insurance—Loss of hogs by carrier—Proofs of loss—Waiver—Evidence—Stockyard books—Best evidence—Identification of handwriting—Bill of lading—Acceptance of limited bill of lading.*

In an action on a policy of livestock insurance, there is sufficient evidence of waiver of proofs of loss, where it appears defendant had actual notice of the damage to the shipment of the animals insured within the time required for filing proofs of loss, and that thereafter defendant's authorized agent wrote a letter to plaintiff on the subject without therein denying

INSURANCE—continued.

liability on the ground that formal proofs of loss had not been furnished, but denying liability on other grounds.

If an insured, in good faith and within the time stipulated, does what he plainly intends as a compliance with the requirements of the policy as to proofs of loss, good faith equally requires that the company shall promptly notify him of their objections.

As the law always seeks the best evidence, so, when new and more certain methods of ascertainment and proof arise, the law, moving forward with and accommodating itself, to the trade customs of the age it is serving, will make use of those means, which trade itself has developed, as an aid to certainty in recording transactions as they occur.

In an action against an insurance company to recover for loss of livestock, books of a stockyard association are admissible for the purpose of showing the condition of the animals when received at the yard, as such books are, under modern conditions, although contrary to the earlier rule, the best evidence.

If, in such case the entries were made by a clerk beyond the jurisdiction of the court, his handwriting may be identified by the traffic manager of the association.

Where livestock policies provide for "clear" bills of lading, and the insured accepts bills on which are stamped the words "accepted subject to delay on account of weather conditions," the insurance company cannot defend against a loss by setting up such variance between the policy and the bills of lading, where there is no proof of delay in shipment from weather conditions or other causes.

If the injury was due to the negligence of the carrier, and the effect of the stipulation was to waive the right of recovery for negligence, the limitation of its liability was, under the law of Pennsylvania, not enforceable by the carrier against the shipper, and, if it did not cover the loss from the carrier's negligence, the insurance company was not injured by it. **Zoller v. Hartford F. Ins. Co.**, 386.

3. *Wills—Decedents' estates—Deficiency of personal assets—Real estate—Conversion—Payment of insurance—Creditors—Failure to establish lien—Conversion—Necessity.* **Reel's Est.**, 135.

JUDGMENT.

1. *Lease of coal lands—Assumption of judgment—Fraud—Rescission of contract—Equity—Findings of fact.*

JUDGMENT—*continued.*

A bill in equity to have a judgment declared paid, is properly dismissed, where the evidence shows: that defendants had leased certain coal lands from plaintiffs, at the same time agreeing to protect the land against the judgment which was a lien thereon; that defendants had paid the judgment and taken an assignment thereof; that shortly afterwards defendants discovered that plaintiffs had made false representations as to the land and coal covered by the lease, whereupon they promptly rescinded the contract; and that the amount paid by the defendants on the judgment had never been returned to them.

The findings of fact of a chancellor will not be reversed on appeal, in the absence of manifest error. **Berlin S. C. & C. Co. v. Rohm**, 24.

2. *Mortgage—Bond—Assignments—Petition to compel assignment.* **Butler County Natl. Bank v. St. Michael's Greek Catholic Church**, 440.

3. *Mortgage—Judgment entered on bond—Opening judgment—Mistake in calculation of amount due—Control of judgment and execution—Payments—Assignment—Notice.* **O'Maley v. Pugliese**, 356.

4. *Opening judgment—Lis pendens—Words and phrases—Church trustees—Judgment for repairs—Equity.*

Lis pendens is the control which a court has over the property involved in a suit during the continuance of the proceedings, and until its final judgment has been rendered therein.

The validity of a judgment note given by the trustee of a church to pay a debt contracted for necessary repairs to the church building, does not depend, under the doctrine of *lis pendens*, upon the outcome of an equity suit, where such suit had nothing to do with the church property, but was brought to restrain the trustees from employing any but a priest of a particular denomination, and to prevent the priest in office from holding religious services.

A judgment entered on such note will not be opened, although it was given to the president of the board of trustees for money advanced by him for repairs, where it appears that in the equity suit a petition was filed which called in question the authority of the trustees to make the repairs, and that the court found against the petitioners, and from such findings no appeal was taken. **Bungar v. St. Michael's G. Catholic Church**, 402.

JUDGMENT—*continued.*

5. *Opening judgment—Practice, C. P.—Trial without notice to counsel—Discretion—Act of 1915, P. L. 483.*

There is no abuse of discretion by the court below in opening a judgment entered on a verdict for plaintiff, in a case begun before the Practice Act of 1915 became effective, where it appears defendant's counsel, believing that the old practice controlled, after filing an affidavit of defense awaited a rule to plead, and plaintiff's counsel placed the case at issue and proceeded to trial *ex parte*, without defendant's counsel having any notice thereof. **Thermo Water Lift Co. v. Air Tight S. T. Co.**, 91.

6. *Opening judgment—Refusal to open—Abuse of discretion—Review.*

The Supreme Court will not reverse an order refusing to open a judgment, where it is not convinced of an abuse of discretion by the lower court in making the order. **Simkin v. McGovern**, 591.

7. *Practice, C. P.—Pleadings—Ejectment—Act of June 7, 1915, P. L. 887—Trusts and trustees—Statute of frauds—Act of April 22, 1856, P. L. 532—Evidence. Levy v. Seadler*, 366.

LEASE.

1. *Equity—Equity practice—Pleading—Scope of decree—Accounting—Partnership—Oil lease—Amendment. Rolshouse v. Wally*, 506.

2. *Mines and mining—Covenant running with land—Covenant as to assignments—Consent of owner—Personal covenant—Subsequent assignees—Res adjudicata. Lowry v. Atlantic Coal Co.*, 19.

3. *Oil and gas lease—Minerals feræ naturæ—Mines and mining—Contracts—Construction—Duty of lessees—Damages—Burden of proof—Mistake in boring—Injunction—Discretion—Reservation—Royalties—Maxims—Æquitas sequitur legem.*

As between the parties to a grant of oil and gas in place, a conveyance thereof is binding and effective, even though they may escape and be lost before being reduced to absolute possession.

The fact that water and oil, and still more strongly gas, may be classed as minerals *feræ naturæ*, does not determine they are not capable of ownership when in place and may not be made the subject of a grant.

Oil and gas are minerals, while in place are part of the land exactly like other minerals, and may be leased separate and

LEASE—*continued.*

apart from the surface of the land and from other minerals beneath it.

All written instruments relating to a particular kind of business must be construed with due regard to the known characteristics of the business.

The fact that there is a distinction, upon questions of interpretation, between an oil and gas lease and other leases, has no relation to the interest or estate conveyed; the dominion of the owner is as absolute over the fluid as over the solid minerals.

It is the duty of the lessee in a gas lease to promptly locate and drill wells on the leased property, with due regard to similar operations on adjoining lands.

Where by a trespass one obtains possession of property which is his, damages for the trespass cannot be measured by the value of the property.

When the lessee of a property and all the gas and oil under it, in good faith and in the belief that he has the right so to do, bores a well at a point forbidden by the lease and obtains gas therefrom, the mistake in boring at that point does not operate to retransfer to the lessor the title to the gas.

An injunction will be granted only as a matter of grace in the exercise of a sound discretion, where it will not harm defendant more than it will benefit plaintiff; the rule is otherwise, however, where defendant acts in bad faith, or in a race with the law to accomplish his purpose before injunctive relief can be obtained, in which events the relative benefits and disadvantages ordinarily will not be considered.

Where a lease covers a tract of land and grants all the oil and gas under it, but forbids the lessor from boring wells on a part of the tract, this is not a reservation of a right on the part of the lessors to bore a well within the prohibited area. If they attempt to do so an injunction may be granted against them.

Where a gas well is drilled by defendant within a prohibited area, and plaintiffs, in consideration of receiving a larger royalty than is provided by the original lease, agree to the drilling therein of a second well, for the purpose of protecting the flow from the first, they cannot retain the excess royalty received from the second well and compel the abandonment of the first.

Plaintiff has the burden of proving the amount of damages which he suffers, and these must be measured as of the time

LEASE—continued.

when they accrued and not as of a later date when the circumstances are materially altered.

Kelly v. Phillips Gas & Oil Co., 262 Pa. 412, cited and distinguished. *Hamilton v. Foster*, 95.

LIBEL.1. *Ambiguous expressions—Case for jury.*

Where words of an alleged libel are ambiguous, and reasonably capable of two meanings, one of which is actionable, and the other innocent, it is for the jury to say in which sense the words were uttered or understood.

The following language is ambiguous and the case accordingly for the jury: "He [plaintiff], while acting as our [defendants'] agent, collected money for our house and solicited business for us, which he turned over to one of our competitors." *Abersold v. Marcus*, 199.

MANDAMUS.

1. *Municipalities—Controller—Refusal to countersign warrant—Ministerial capacity—Approval of bill for legal services by council—Presumption—Specific remedy at law—Attorney-at-law—Contract to lowest bidder.* *Com. ex rel. v. Tice*, 447.

MARRIAGE.

1. *Proof of—Cohabitation and reputation—Illicit intercourse—Presumption—Claim of alleged widow of decedent—Husband and wife—Decedents' estates—Evidence—Findings of fact—Orphans' court—Appeal.*

A finding by the orphans' court that a marriage did not in fact exist between decedent and a woman claiming to be his widow, when based upon sufficient and competent evidence, will not be reversed on appeal, in the absence of manifest error or mistake.

When it is attempted to establish marriage without the usual formalities, the courts will examine with great scrutiny an alleged oral marital contract and the conduct of the parties in relation to each other before and after such contract.

Where there has been an admitted illicit course of conduct for many years between a decedent and a woman claiming to be his widow, and the woman alleges a marital contract by words spoken by decedent, marriage will not be presumed because of cohabitation and reputation without proof of a changed relation.

Marriage is a civil contract by which a man and woman agree to take each other for husband and wife during their joint lives, unless it is annulled by law. Each must be

MARRIAGE—continued.

capable of assenting, and must in fact consent to form this new relation.

Where an undoubted marriage in some form exists, the courts will hesitate to strike it down; but when the lips of a man are sealed by death, and he leaves no satisfactory evidence as to the existence of such contract, they will be slow to establish it in derogation of the undoubted rights of those who follow him. *Stevenson's Est.*, 291.

MASTER AND SERVANT, see Workmen's Compensation.

1. *Contract—Compensation—Allotments of stock—"Voluntarily quit" employment. Schotter v. Carnegie Steel Co.*, 437.

2. *Negligence—Employee of independent contractor—Moving crane—Warning—Notice—Contributory negligence—Case for jury. Craig v. Riter Conley Mfg. Co.*, 219.

3. *Negligence—Railroads—Assumption of risk—Knowledge of risk—Case for jury. Dollar S. F. & T. Co. v. Penna. Co.*, 364.

4. *Negligence—Railroads—Defective coupler—Safety appliance—Federal acts—Contributory negligence—Federal Employers' Liability Act of 1908—Federal Safety Appliance Act. Glockner v. Penna. R. R. Co.*, 312.

5. *Negligence—Railroads—Safety appliance—Defect—Federal Act of March 21, 1893—Coupling cars—Contributory negligence—Case for jury—Verdict—Damages—Excessive verdict. Crumley v. R. R. Co.*, 226.

6. *Wages—Attachment—Act of April 15, 1845, P. L. 419—Salary—Accumulations—Bonus.*

The protection afforded by the Act of April 18, 1845, P. L. 460, is not lost because wages were not paid by an employer when due, but were permitted to accumulate in his hands.

Wages which are prevented from being paid over to an employee, by reason of service of an attachment, are exempt.

Where an employee was to receive a bonus in addition to wages, conditioned upon his being alive at the time of the termination of the current term of the agreement of employment, such bonus could not be attached until the term was ended, even if otherwise attachable.

The terms wages and salary, exempt from attachment, include all money paid for personal services, whether in the form of regular payments or in the form of bonus or commissions, where there is no element of direct profit on the labor of others. *Dansiger v. Ferber*, 193.

MASTER AND SERVANT—continued.

7. *Workmen's compensation—Railroads — Interstate commerce. McNeill v. Director Genl. of Railroads, 525.*

MECHANIC'S LIEN.

1. *Railroad buildings—Office building—Freight station—Function of court and jury.*

Where a railroad company builds under one contract and at one time a freight station and an office building firmly fastened together with communicating doors and passages, and the primary purpose is a freight station with an office building for the convenience of the employees of the freight station, the building is one structure, and a mechanic's lien cannot be filed against a part of it.

Nor can a mechanic's lien be filed against the building as an entirety, where it appears that the building is necessary for the exercise of the corporate franchises of the railroad company.

The necessity is not an absolute but a reasonable necessity,—i. e., property which is reasonably necessary in carrying out the purposes of the public service corporation with the greatest facility and convenience to itself and the public.

The structure remains a railroad freight office building notwithstanding the fact that the first floor comprises store rooms, which, with their basements, are rented for business purposes.

Such building cannot be sold on a writ of *levari facias*.

Where the object of the structure and the uses made of it do not depend upon the credibility of witnesses, but upon all the evidence, oral and written, of both sides, and no controlling fact is in controversy, it is the duty of the court to pass upon the case, and not submit it to the jury. *McNulty Bros. Co. v. Penna. R. R., 442.*

MINES AND MINING.

1. *Evidence—Contradiction of witness by physical facts—Case for jury unlawful mining of coal—Statement of claim—Damages—Act of May 8, 1876, P. L. 142. Fuher v. Westmoreland Coal Co., 14.*

2. *Lease—Covenant running with land—Covenant as to assignments—Consent of owner—Personal covenant—Subsequent assignees—Res adjudicata.*

The assignee of a lease is not bound by stipulations which arise from the contract made by another, but only from the liability arising from privity of estate.

MINES AND MINING—*continued.*

Where the owner of coal, leases mining rights therein, on royalty for a term of years, and stipulates that the assignee shall not assign the lease without the written consent of the owner, such covenant is a personal one by the lessee, and where he assigns with the written consent of the owner, his assignee is not bound by the covenant, but may assign the lease without the owner's consent.

If the lessee so assigns the lease, the assignee becomes liable for the royalty, and the responsibility of the lessee ends.

Covenants to pay rent or royalty run with the land, and the assignee is bound by their terms, and this is so though the lease binds the original party and his assigns.

In such case it is immaterial that the assignee is of no financial worth, so long as it appears that the transfer was not merely colorable.

In a suit against a second assignee for royalty which had become due after the date of a third assignment, and after the third assignee had taken possession, a successful suit against the second assignee for royalties which had accrued in the previous year cannot be set up as *res adjudicata*. The cause of action was not the same in the two suits. **Lowry v. Atlantic Coal Co.**, 19.

3. *Lease—Oil and gas lease—Contracts—Construction—Duty of lessees—Damages—Burden of proof—Mistake in boring—Injunction—Discretion—Reservation—Royalties—Maxims—Æquitas sequentur legem.* **Hamilton v. Foster**, 95.

4. *Surface support—Release—Damages—Covenants—Injury to water supply—Drilling well for water—Care of well—Negligence—Evidence—Presumption—Equity maxim—Sic utere tuo.*

The owner of an entire estate may, in conveying, relieve the owner of the mineral estate from the duty to support the surface and from liability for any injury or damages by mining and removing coal.

Where in such case the grantee simply removes coal, it is not improper mining; even if such removal is negligently done, there can be no recovery.

Where a conveyance of coal provides that if the removal of the coal destroys a water supply of a building on the surface, the grantee shall bore a well and case it to a certain depth, and it appears that the successor in title to the grantee drilled and cased a well, and that thereafter the casings were broken and destroyed in mining operations to the destruction of the water supply, the court, in an action against the owner of the

MINES AND MINING—continued.

coal for damages, commits reversible error if it charges that defendant was required to refrain from all acts which would interfere with, injure or destroy the well.

In such case, defendant owes the owner of the surface only the duty of refraining from negligent acts, which might injure the well.

The maxim that one must so use his own property as not to injure another has reference not to the mere infliction of damage but to the violation of a right and means only that one must so use his own as not to violate a legal right of another.

Where coal is being mined solely by one person from underlying strata owned by him, the presumption is, when the coal is removed, the owner removes it, although done by his employees; and if there is evidence, such as breaking, subsidence and other conditions, to indicate that coal was being removed, there is a sufficient connection between defendant and acts resulting in an injury to the surface from the mining of the coal.

Pa. Cent. Brewing Co. v. Lehigh Valley Coal Co., 250 Pa. 300, distinguished and explained. **Householder v. Quema-honing Coal Co.**, 78.

5. *Surface support—Right of action.*

Where one person owns the surface, a second the mineral thereunder, and the third a right of support, the owner of the surface has no right of action for subsidence against the owner of the minerals. **Young v. Thompson**, 360.

MORTGAGE.

1. *Bond—Judgments—Assignments—Petition to compel assignment.*

A bank holding a mortgage, bond and two junior judgments against a corporation, will not be compelled to assign them, in payment of the mortgage debt and interest thereon, to certain parties, who deny the validity of the two judgments, where other parties interested in the church offer to pay the entire indebtedness of the church, including the two judgments. **Butler County Natl. Bank v. St. Michael's Greek C. Church**, 440.

2. *Judgment entered on bond—Opening judgment—Mistake in calculation of amount due—Control of judgment and execution—Payments—Assignment—Notice.*

Where a warrant of attorney to confess judgment, in a bond accompanying a mortgage, contains no limit as to time, judgment may be entered thereon by the mortgagee without

MORTGAGES—continued.

waiting for the maturity of the obligation, or default thereon; but such judgment and execution thereon remain within the control of the court.

The lien of the judgment relates back to that of the mortgage, and, in entering it, the mortgagee is acting within his rights, unless debarred therefrom by his fraudulent conduct, and that is primarily a question for the lower court.

In liquidating the damages upon such a judgment, any errors which result from miscalculation should be adjusted by the court below without opening the judgment; as should the right to, and extent of, attorney's commissions for collection.

Payments made to a mortgagee without notice of an assignment are valid. *O'Maley v. Pugliese*, 356.

MUNICIPALITIES.

1. *Building laws—Cities of second class—Officers—Ministerial duties—Permits—Garage—Board of city planning—Acts of June 7, 1895, P. L. 135—March 7, 1901, P. L. 20—June 10, 1911, P. L. 872; May 13, 1915, P. L. 297, and June 21, 1919, P. L. 570—Mandamus—Nuisance. Coyne v. Pritchard*, 424.

2. *Constitutional law—Titles of acts—Amending act—Acts of June 27, 1913, and July 6, 1917—Boroughs—Annexation—Cities of the third class. Com. ex rel. v. Dale Borough*, 189.

3. *Controller—Refusal to countersign warrant—Ministerial capacity—Approval of bill for legal services by council—Presumption—Mandamus—Return, sufficiency of averments—Specific remedy at law—Attorney-at-law—Contract to lowest bidder.*

In the absence of fraud, the validity of a claim for legal services approved by the council of a municipality, cannot be questioned by the controller. The presumption is that the mayor and council properly perform their duties.

It is not necessary for an attorney-at-law to present an itemized bill for legal services rendered to a municipality, and this is specially the case when they are rendered in the preparation and trial of a single case.

In doing the routine work of passing accounts, countersigning warrants, etc., the controller acts in a ministerial capacity, and may be compelled to perform such duty by mandamus.

Where a warrant is presented to a controller thirty days before the return to a writ of mandamus, an averment in the return that there is at the present time no money in the

MUNICIPALITIES—*continued.*

treasury legally applicable for the payment of the same, is insufficient, as there may have been money in the treasury when the warrant was presented.

In a mandamus proceeding to compel a city controller to countersign a warrant approved by councils, an averment of an adequate and specific remedy at law cannot be sustained.

A statute requiring municipal contracts for supplies, etc., to be let to the lowest responsible bidder, is not applicable to an employment for legal services. *Com. ex rel. v. Tice*, 447.

4. *Hole in pavement—Notice—Time—Constructive notice—High-heeled shoes.* *Calligan v. Monongahela City*, 28.

MURDER, see Criminal Law.

NEGLIGENCE.

1. *Affidavit of defense—Facts not denied admitted—Practice, C. P.—Act of May 14, 1915, P. L. 483—Evidence—Damages—Contributory negligence.*

Under sections 6 and 13 of the Practice Act of May 14, 1915, P. L. 483, where no affidavit of defense has been filed to a statement of claim which avers injury or death by the negligent act of the defendant, the plaintiff need not prove whose negligence was the cause thereof, and defendant will not be permitted to contest that question; but the proofs must show that the injury or death resulted from actual negligence of the character averred in the statement of claim, that plaintiff was damaged by reason thereof, and the extent of his damage.

Since the act does not deal with the subject of contributory negligence, all matters relating thereto, whether substantive or procedural, remain unaffected by its passage. *Gillespie v. Penna. Co.*, 393.

2. *Automobiles—Collision—Car driven by minor son without license.*

In an action to recover damages for death of plaintiff's husband in a collision between two autotrucks, where it appears that the decedent's truck was driven at the time by his son, an experienced driver under eighteen years of age without a license, the case is for the jury on the conflicting evidence as to the cause of the accident; and binding instructions for defendant on the ground that the deceased was guilty of contributory negligence in permitting his son to drive the truck, are properly refused.

NEGLIGENCE—*continued.*

In such case, the minority of the son had no causal relation to the accident. *Scorsoni v. Pittsburgh P. & P. Co.*, 253.

3. *Automobiles—Collision between car and sled—Res ipsa loquitur—Sudden emergency—Obstruction of view—Notice of sledding.*

The mere fact that an automobile comes in contact with a sled coasting across a road, raises no presumption of lack of care on the part of the driver of the automobile.

One who, in sudden emergency, acts according to his best judgment, or who, because of want of time in which to form that judgment, omits to act in the most judicious manner, is not chargeable with negligence.

Where an automobile collides with a sled coasting across the road, and the evidence shows that the driver of the automobile had no actual or constructive notice of sledding at the place of the accident, and that, under the circumstances and in the sudden emergency, he did what a reasonably prudent man would do in endeavoring to move his car from the path of the oncoming sled, he cannot be charged with negligence, and a case against him should not be submitted to the jury.

In such case the evidence must be of a convincing character to justify a jury in finding that the driver must have been aware of coasting at the place of the accident, and therefore had imposed upon him the duty of taking unusual care. *Leslie v. Catanzaro*, 419.

4. *Automobiles—Infant near school house—Crossings—Contributory negligence—Conflicting evidence—Case for jury—Evidence of negligence from accident—Res ipsa loquitur.*

It is the duty of a driver of an automobile to have his car under such control at street intersections as to be able to stop at the shortest possible notice.

For a motor vehicle to run down a pedestrian who is in full view and does not suddenly change his course, is evidence of negligence.

There may be negligence in failing to have a motor vehicle under proper control, without excessive speed.

The tendency of small children to run across streets, especially at or near school houses, must not be ignored by drivers of motor vehicles.

As a pedestrian may lawfully cross a street at any point, the fact that he crosses in the middle of the block, will not in itself charge him with contributory negligence.

In an action to recover for injuries to a child, six years old, run down by a motor truck near a school house, the case is for

NEGLIGENCE—continued.

the jury where the evidence is conflicting, as to whether or not the child was at a street intersection, and as to whether or not she darted out from behind a trolley car. **Rankin v. Ward Baking Co.**, 108.

5. *Automobiles—Master and servant—Master's business—Statement of claim—Evidence—Placing admission on record, no affidavit of defense—Practice Act of May 14, 1915, P. L. 483.*

In an action to recover damages for injuries resulting from an automobile accident, it is necessary for plaintiff to prove, in some adequate manner, not only that defendant was the owner of the car, and the driver his servant, but that such servant was at the time engaged in the master's business.

The fact that the defendant was the owner of the car in itself alone furnishes no foundation for his liability.

Where the statement of claim avers that the driver was defendant's servant or agent, but does not specifically aver that he was engaged in the performance of defendant's service at the time of the accident, and there is nothing in the evidence to show that the driver was so engaged and such fact is in no way put in the record, it is reversible error for the court to charge that the averment that the automobile was driven by defendant's servant, was a sufficient averment on which to base liability, if the driver was negligent.

Admissions, under the Act of May 14, 1915, P. L. 483, by failure of denial by affidavit of defense, are not placed on the record by the court in his charge stating these facts to the stenographer and jury; he must direct the facts to be placed on the notes of trial.

Since the practice was not established when this case was tried, the appellate court will not enter judgment for defendant n. o. v., but will send the case back for another trial, in order that the true situation as to the driver's employment at the time of the accident may be properly developed. **Farbe v. Oaskey**, 573.

6. *Automobile—Street crossing—Pedestrian.*

Recovery may be had against the owner of an automobile which struck a pedestrian at a regular street crossing, where it appears that the car, suddenly and without warning turned into the street which plaintiff was crossing and struck him when he was in plain view of the chauffeur, and when he had not gone more than ten feet in his passage across the street. **Maharius v. Morris**, 587.

NEGLIGENCE—*continued.*7. *Custom—Evidence—Moving cranes—Contributory negligence—Sudden danger.*

A custom to be good should be certain, continued, reasonable, distinct, uncontradicted, and so notorious as probably to be known to the parties to the contract.

To prove negligence in the operation of a plant, evidence of customary methods pursued in other like establishments is not admissible to make out plaintiff's case, except under extraordinary circumstances.

In an action for personal injuries by an employee of an independent contractor, against the owner of a steel plant, where it appears that plaintiff was injured while working on the runway of a crane far above the working floor, it is error to admit evidence of a custom to ring a bell as a warning of the approach of a crane, where it was not disputed that a bell was rung to warn men on the working floor far below, without it any where appearing that men working on the runway far above required such notice.

In such case, the evidence is insufficient to convict plaintiff of contributory negligence as a matter of law, where it appears that the only way that he could reach his work was by climbing past the runway, that defendant was warned to look after him and promised to do so, that it was doubtful whether plaintiff could have seen the crane approach on his ascent, but that as soon as he was in a position to see it from the runway, it was too close for him to escape.

Defendant could continue to operate the crane, under the circumstances, but it was bound to use reasonable care, considering the work which the employees of the independent contractor had to do.

Where a sudden emergency presents itself to a workman, he should not be held negligent though he may have done imprudent things thereafter. **Brown v. Am. Steel Foundries**, 231.

8. *Damages—Evidence—Experts—Opinion—Disease result of injury—Loss of earning power.*

When expert testimony is relied on to show the connection between an alleged cause and a certain result, it is not enough for the doctors to say simply that the ailment in question might have resulted from the assigned cause, or that the one could have brought about the other; they must go further and testify at least that, taking into consideration all the attending data, it is their professional opinion the result in question most probably came from the cause alleged.

NEGLIGENCE—*continued.*

Where it is equally probable that the disease resulted from two or more causes, for only one of which defendant is responsible, there can be no recovery.

The loss of earning power and its amount must appear by proper and satisfactory proof and not be left to conjecture.

Where a widow has not worked for wages for many years, but resided with her adult children, and kept house for them, it is reversible error for the court, in an action to recover damages for personal injuries to her, to submit to the jury the question of her loss of earning power, where there is no proof as to the value of the services which she did or could perform.

In such case, evidence that a daughter temporarily left her own employment to care for the mother and do the housework, and that the latter promised to pay the daughter wages she thereby lost, while proper as showing the mother's damages during that time, did not tend to establish her earning capacity, as the daughter's general employment was entirely different.

The mere fact that plaintiff was not a wage earner, prior to the accident, will not prevent her recovering for loss of earning power. **Zimmerman v. Weinroth**, 537.

9. Damages—Insurance.

Ordinarily the amount for which property is insured does not, in an action for its destruction by fire, afford a test of value, of sufficient probative effect to be admissible. **Pittsburgh F. & I. Co. v. Dravo Contracting Co.**, 118.

10. Employee of independent contractor—Moving crane—Warning—Notice—Master and servant—Contributory negligence—Case for jury.

In an action by an employee of an independent contractor to recover damages for personal injuries suffered while at work on alterations in defendant's building, the case is for the jury, where the evidence, though contradicted, tends to show that plaintiff was injured while standing on a girder, by the end of a moving crane striking him, that defendant's foreman knew of the presence of defendant, promised to protect him, but had failed to do so by giving the usual warning by gong, and that the man operating the crane could have seen plaintiff if he had looked.

The presence of plaintiff on the girder, in view of all the circumstances, could not convict him of contributory negligence as a legal conclusion.

The work being done was for the mutual benefit of all parties and plaintiff was in the plant by the implied invitation

NEGLIGENCE—continued.

of defendant company, which was therefore bound to use reasonable care for his safety. **Craig v. Riter Conley Mfg. Co.**, 219.

11. Infants—Driving boy from wagon—Wanton act of driver—Case for jury—Nonsuit.

Where a boy, six and one-half years old, climbs upon a wagon by permission of the driver, and, while riding thereon, the driver, without stopping and putting the child off, strikes at him with a whip, and the boy in his fright and haste jumps off the wagon and is injured, the owner of the wagon and employer of the driver is liable in damages for the injuries sustained.

In such case it is the driver's wanton act, and not the fact that the boy got on the wagon with the driver's permission, that is the determining factor as to the owner's liability.

Hughes v. Murdock Storage & Transfer Co., 269 Pa. 222, distinguished. **Lafferty v. Armour**, 588.

12. Injuries—Evidence—Expert testimony.

In an accident case, testimony by a physician that a permanent injury complained of could have occurred from the accident, is insufficient, if the finding of the jury is to rest alone on expert testimony. To be effective, such witness must necessarily state at least that the present condition probably resulted from the injury.

Where one of two or more possible causes may have resulted in an injury, the burden is on plaintiff to show that the one for which defendant was responsible was the proximate cause, and that the harm done followed as the natural and probable result, without the intervention of some intermediate agency not attributable to defendant's wrongful act. **Sullivan v. B. & O. R. R.**, 429.

13. Injuries to minor child—Damages—New trial—Discretion of court—Abuse—Appeal.

In an action to recover damages for injuries to a minor child six years old, a verdict for \$2,500 for the father, is not excessive, where it appears that his expenses, by reason of the accident, amounted to over \$900.

Nor is a verdict for \$10,000 for the child necessarily excessive, where it appears that her leg was crushed, that she was confined to the hospital for five months, and that there would be an arrested growth of her leg with permanent deformity and disability.

NEGLIGENCE—*continued.*

The lower court's refusal of a new trial in such case is not an abuse of discretion so as to call for reversal on appeal. **Rankin v. Ward Baking Co.**, 108.

14. *Mines and mining—Surface support—Release—Damages—Covenants—Injury to water supply—Drilling well for water—Care of well—Evidence—Presumption—Equity maxim—Sic utere tuo.* **Householder v. Quemahoning Coal Co.**, 78.

15. *Minors—Employment of minor—Certificate—Charge—Harmless error—Act of May 13, 1915, P. L. 286—Evidence inadmissible when offered—Age of minor—Fact of age—Ignorance of age—Appeal.*

In an action by a minor under sixteen years of age brought by his father, and by the father in his own right, against the boy's employer, where the father admits knowledge of his son's employment in violation of the Act of May 13, 1915, P. L. 286, the defendant is entitled to binding instructions, so far as the individual claim of the father is concerned.

The court cannot be convicted of error for refusing a general offer of defendant to show that the minor plaintiff was sixteen when employed, where the record and notes of trial show that, at the time of the offer, the defense relied on was lack of knowledge of the boy's true age at the date of employment, and not the assertion that he was then over sixteen.

Evidence that the minor made a false statement of his age to defendant prior to his employment is inadmissible.

Where an objection to testimony is based on a reason, in itself good, according to the issues apparently involved, and the objection is sustained, the ruling will be affirmed on appeal though appellant may then call attention to grounds, other than those suggested when the ruling was made, which ordinarily would warrant the admission of the proofs tendered.

A suggestion made in a charge that a Pennsylvania employer must obtain a certificate under the Act of May 13, 1915, P. L. 286, for all youthful employees, whether under or over sixteen, whereas the obligation extends only to those under that age, is not ground for reversal, where the jury were not told that the absence of the certificate made the defendant liable, and such instruction is therefore harmless error. **Plater v. Baker**, 541.

16. *Municipalities—Hole in pavement—Notice—Time—Constructive notice—High-heeled shoes.*

It is negligence for a city to leave so large a hole in one of

NEGLIGENCE—*continued.*

its pavements that heels of the usual size will probably catch therein and cause the wearer to be thrown to the ground; but it is not required to anticipate the possibility of accidents by the use of abnormally narrow heels, however fashionable they may be.

Where the evidence shows a number of holes in a pavement, it is sufficient if the particular one, regarding which complaint is made, is proved to have existed for such a length of time as to require the city then to take notice thereof. **Calligan v. Monongahela City**, 28.

17. *Municipality—Sidewalk—Ice and snow—Knowledge of unsafe condition—Contributory negligence—Choice of two ways.*

Where a woman has knowledge of the rough surface of an unpaved portion of a sidewalk, and, in walking along the sidewalk in broad daylight, at a time when it is covered with ice and snow, steps from the smooth even pavement to the portion she knew was rough, she does so at her own risk, and if she falls and is injured, she cannot hold the municipality liable; and especially is this so where it appears that she could have used the car tracks in the centre of the street which were clear of ice and snow and used by many pedestrians.

Under the facts of this case defendant was not guilty of negligence. **Nolan v. Pittsburgh**, 217.

18. *Piling boards in street—Evidence—Case for jury—Infants.*

In an action for damages for personal injuries to a child ten years old, suffered while playing around a pile of logs placed by defendant in a street, a verdict for defendant will be sustained, where the evidence for plaintiff tended to show that the logs were so carelessly piled that they were liable to roll down and injure children playing about them, while defendant's evidence showed due care. **Sheplan v. Kramer Woodworking Co.**, 518.

19. *Railroads—Crossings—"Stop, look and listen"—Contributory negligence—Judgment on record—Act of April 20, 1911, P. L. 70.*

In an action against a railroad company for personal injuries sustained at a grade crossing, it is proper to enter judgment on the whole record under the Act of April 20, 1911, P. L. 70, where the evidence shows that at the crossing there were two tracks, that if plaintiff had looked, at a point

NEGLIGENCE—continued.

five feet away from the first track, he could have seen a train approaching on the second track for a distance of 600 or 700 feet, and that if, after crossing the first track safely, he had looked before entering on the second track, he could have avoided the accident. **Sakall v. B. & O. R. R.**, 89.

20. Railroads—Damages—Excessive verdict—Abuse of discretion—Act of May 20, 1891, P. L. 101—Review.

The amount of a verdict will not be disturbed by the appellate court, except in cases where so grossly excessive as to shock the sense of justice, and where the impropriety of allowing it to stand is so manifest as to show clear abuse of discretion of the court below in refusing to set aside.

A verdict of \$7,250 in favor of a practicing physician 69 years of age, will not be set aside where it appears his earnings had decreased since his injuries, from \$7 or \$10 to \$2.50 a day, and that his eyesight and memory had become impaired, as had also his general physical condition. **Stevenson v. Davis**, 361.

21. Railroads—Interstate commerce—Federal Employers' Liability Act of April 22, 1908, 35 Stat. 65, ch. 149—Evidence—Brakeman—Defective appliance—Case for jury—Happening of accident—Res ipsa loquitur.

In an action for personal injuries under the Federal Employers' Liability Act, plaintiff must show not only that the carrier was engaged in interstate commerce, but also that he himself was so engaged at the time of the injury.

Where the evidence is clear enough to justify a declaration as to the class of work in which plaintiff was engaged, the court may so declare; but, where the question rests upon facts as to which there may be doubt, the solution is for the jury.

The fact that intrastate as well as interstate cars were included in the train upon which plaintiff was injured, does not alter the character of the service.

If plaintiff brings his suit under the Federal Employers' Liability Act, instead of the Safety Appliance Act, he is bound to present a case free from facts showing the risk was one which had been assumed by him when employment was accepted.

A railroad company is bound to exercise due care to ascertain whether its appliances remain in a reasonably safe condition, and to remedy any defects which may be discovered.

In an action by a brakeman against his employer for in-

NEGLIGENCE—continued.

juries sustained by the breaking of a defective ladder on a car, the case is for the jury where the only witness as to the defective condition of the ladder was plaintiff himself, and the witnesses for defendant testify that no such defect appeared upon inspection.

The mere fact of the happening of the accident gave rise to no presumption of negligence. *Sullivan v. B. & O. R. R.*, 429.

22. Railroads—Joint use of tracks by two companies—Death—Case for jury—Contributory negligence—Anticipating negligence—Judgment n. o. v.

Where two railroad companies jointly use the same tracks, each is required to exercise reasonable care to avoid injury to the servants of the other.

Where a freight conductor of one company is killed while throwing a switch in the operation of his own cars, by a moving car of the other company, and the evidence tends strongly to show that the operation of such car was negligent, and there was nothing shown to put the deceased upon notice that the train which struck him was likely to approach, the case is for the jury.

In such case deceased was not required to anticipate negligence on the part of defendant.

Where the issue of contributory negligence has been submitted to the jury, a finding in favor of plaintiff will not be set aside unless, on a review of the evidence in the light most favorable to plaintiff, it is inconceivable that a mind desiring only a just and proper determination of the question could reasonably reach any other conclusion than that plaintiff had brought on or contributed to the injury by his own carelessness. *Hastings v. So. Shore R. R.*, 212.

23. Railroads—Master and servant—Assumption of risk—Knowledge of risk—Case for jury.

An employee must know the circumstances and appreciate the risk before he will be held to have assumed it.

In an action against a railroad company to recover damages for death of a yard brakeman employed by defendant, the case is for the jury, where the evidence shows that deceased was squeezed to death while walking between a car and a wall, on a siding where he had never been before, that he had not been warned that the place was a dangerous point,

NEGLIGENCE—*continued.*

and that no warning signals had been given to him before the accident. **Dollar S. F. & T. Co. v. Penna. Co.**, 364.

24. *Railroads—Speed—Signals—Warnings—Negative evidence of plaintiff—Positive evidence of defendant—Case for court.*

Railroads operating their trains in the open country may move them at such rate of speed as the character of their machinery and roadbed may make practicable.

In operating trains in the open country, it is not the rate of speed at crossings that is the negligence of the company but the failure to give proper notice of the approach of the train.

In an action for death of a passenger on an automobile truck in a collision with a train at a crossing in the open country, the evidence of defendant's failure to give proper signals and warnings is insufficient to submit to the jury, where the testimony of the witnesses for plaintiff was all negative in character, being, in effect, that they did not hear any signals without showing that they were watchful or attentive for a signal, while numerous witnesses, both employees of defendant and others, testified positively that they heard the whistle blow and the bell ring. **Craft v. Hines**, 499.

25. *Railroads—Master and servant—Defective coupler—Safety appliance—Federal acts—Contributory negligence—Federal Employers' Liability Act of 1908—Federal Safety Appliance Act.*

A brakeman who is injured while engaged in interstate commerce employment, by the failure of a defective coupler to act, may recover damages from his employer, although he himself may have been guilty of contributory negligence.

The Federal Safety Appliance Act provides that an employee shall not be held to have assumed the risk of an injury due to the use of a coupling which fails to comply with the law, and the Federal Employers' Liability Act of 1908 takes away the defense of contributory negligence if a defective coupler contributed to the injury. **Glockner v. Penna. R. R.**, 312.

26. *Railroads—Master and servant—Safety appliance—Defect—Federal Act of March 21, 1893—Coupling cars—Contributory negligence—Case for jury—Verdict—Damages—Excessive verdict.*

NEGLIGENCE—*continued.*

In an action by a brakeman against his employer for personal injuries, the case is for the jury, where it appears that plaintiff, while engaged in interstate commerce, was injured by the failure of a coupling lever to work, and the evidence tends to show that the coupling pin was bent, and that the conductor in charge of the train, after the accident, experienced difficulty in working the device, and was obliged forcibly to strike the lever a number of times before it would operate.

Under the Federal Employer's Liability Act, contributory negligence of plaintiff is no defense, if a defect in a coupler caused or contributed to his injury.

A verdict of \$8,120, in an accident case, will not be held excessive if it appears that plaintiff's injury was a crushed foot, resulting in a permanent impairment, and causing difficulty in walking. *Cramley v. Penna. R. R.*, 226.

27. Statement—Evidence—Allegata and probata—Amendment—Surprise—Waiver—Continuance—Appeal—Proximate cause—Fire—Oil on river—Spreading fire by wind—Intervening independent agency—Things to be naturally anticipated—Act of God or vis inertia.

In an action to recover damages for the destruction of plaintiff's wharf by fire, where the statement of claim charges negligence in permitting a burning board to be placed in a river covered with oil which was "being carried thence down the river and along and past plaintiff's property," and that defendant knew or should have known that the current of the river was carrying the oil down and along plaintiff's property, it is error for the trial judge, after admitting evidence, against objection, that the oil before the fire extended from defendant's operation to and past plaintiff's wharf, to instruct the jury to disregard such evidence as not in accordance with the statement of claim.

The ruling of the judge admitting the evidence was equivalent to an amendment of the statement; and, if defendant was not prepared to meet the issue in that form, it should have pleaded surprise, and asked a continuance; it is too late to raise that objection on appeal.

In such case, the fire resulting from the throwing of the burning board on the oil, the result must have been foreseen not only to be possible but probable and natural, to make defendant liable.

NEGLIGENCE—*continued.*

An instruction that no recovery could be had unless the current carried the fire to the plaintiff's wharf and such a result was naturally to be foreseen, is erroneous in view of evidence that the body of oil was continuous between the point of defendant's operation and plaintiff's wharf.

It was also error to charge, in the absence of testimony of unusual wind conditions, that defendant was not bound to anticipate the action of the air currents, and if the fire was so conveyed, this would constitute an intervening independent agency which would relieve from liability.

The ordinary danger of wind helping a fire to spread is one of the things to be naturally anticipated. **Pittsburgh F. & I. Co. v. Dravo Contracting Co.**, 118.

28. *Street railways—Licensee on car—Presumption from accident as to passengers—Work car—Wilful acts.*

Where a person employed by a municipality as an inspector of repair work on the tracks of a street railway, is invited by the foreman of the railway company to enter a work car as a convenient place to eat his lunch, and is injured while the car is being shifted, he is a mere licensee, and the presumption of negligence on the part of the company arising where a passenger is injured during transportation, does not apply in his favor.

As plaintiff's duty did not require him to ride on a work car, there was no authority in the foreman to transport him or to invite him to enter the car.

The company owed him no duty except to refrain from injuring him by intentional, wanton, or wilful acts. **Bally v. Pittsburgh Rys.**, 178.

NOTICE.

1. *Equity—Accounting for profits—Purchase of coal lands—Joint owners—One party buying out the other—Signature to paper—Modification of paper—Notice—Trusts and trustees—Constructive trust—Trustee ex maleficio.* **Williamson v. Dawson**, 370.

2. *Mortgage—Judgment entered on bond—Opening judgment—Mistake in calculation of amount due—Control of judgment and execution—Payments—Assignment.* **O'Maley v. Pugliese**, 356.

3. *Negligence—Employee of independent contractor—Moving crane—Warning—Master and servant—Contributory negligence—Case for jury.* **Craig v. Riter Conley Mfg. Co.**, 219.

NOTICE—*continued.*

4. *Negligence—Municipalities—Hole in pavement—Time—Constructive notice—High-heeled shoes. Calligan v. Monongahela City, 28.*

NUISANCE.

1. *Building law—Municipalities—Cities of second class—Officers—Ministerial duties—Permits—Garage—Board of city planning—Acts of June 7, 1895, P. L. 135; March 7, 1901, P. L. 20; June 10, 1911, P. L. 872; May 13, 1915, P. L. 298, and June 21, 1919, P. L. 570—Mandamus. Coyne v. Prichard, 424.*

PARENT AND CHILD.

1. *Deed—Conveyance for support—Mental capacity of grantor—Confidential relation—Burden of proof—Evidence—Party dead. Fiscus v. Fiscus, 326.*

PARTNERSHIP.

1. *Compensation of partners for services.*

Compensation of partners for personal services will not be allowed, where there is no provision for such in the partnership articles. *Bolschouse v. Wally, 506.*

2. *Fictitious name—Trading under—Partnership—Act of June 23, 1917, P. L. 645. Walker v. Mason, 315.*

3. *Practice, C. P.—Parties—Statement of claim—Promissory notes—Presumption—Act of May 14, 1915, P. L. 483.*

Where a statement of claim shows that the action is against partners, it is not necessary to expressly aver a joint liability.

In an action against partners, it is not necessary to aver that one of them had authority to borrow the money for which suit is brought, since, in the absence of express or implied notice to the contrary, it is presumed each partner is the agent of his copartners, authorized to borrow money for the firm and to give obligations therefor.

Where a statement of claim avers that a note was drawn for the benefit of the firm, was endorsed by plaintiff as an accommodation to the firm, was discounted for the firm, and the proceeds received by the firm, these are sufficient averments, so far as plaintiff is concerned, that the note did not come to the partnership in due course.

4. *Under such circumstances, one who makes or endorses a note may recover against the members of the partnership, if he is later compelled to pay the firm debt, even though the*

PARTNERSHIP—continued.

names of the partners did not appear on the obligation.
Rhodes v. Terheyden, 397.

PERPETUITY.

1. *Wills—Illegal devise—Intention—Trusts and trustees.*
Lilley's Est., 143.

PLEADINGS, see Practice, C. P.

1. *Contract—Sale by periodical deliveries—By-product of plant—Incorporation of vendors—Assignment—Personal qualities of vendors—Mutuality—Assignability.* **Walker v. Mason**, 315.

2. *Equity—Equity practice—Scope of decree—Accounting—Partnership—Oil lease—Amendment.* **Bolshouse v. Wally**, 506.

3. *Practice, equity—Proofs—Decree—Damages.* **Reilly v. Magee**, 406.

4. *Statutes—Presumption—Fact.* **Putnam v. Ensign Oil Co.**, 301.

5. *Trade-mark—Unfair competition—Equity—Injunction—Demurrer.* **B. V. D. Co. v. Kaufmann & Baer Co.**, 240.

PRACTICE, C. P.

1. *Affidavit of defense—Contradictory or equivocal averments—Sale.*

An affidavit of defense must be considered as a whole, and a general denial therein is of no avail. An affidavit that is contradictory or equivocal is insufficient.

In an action for failure to deliver goods under a contract of sale, an affidavit of defense is insufficient, which, on the question of damages, denies generally that there was any market or market price for such goods, but admits facts which show that there was a market price. **Iron Trade Products Co. v. Wilkoff Co.**, 172.

2. *Affidavit of defense—Doubtful averments—Res adjudicata.*

An evasive affidavit of defense is bad.

If an affidavit of defense leaves in doubt exactly what it means, the doubt must be resolved in favor of the plaintiff.

An averment in an affidavit of defense that a pending cause of action had been determined in a prior proceeding, must be so exact and full as to remove all doubt on the subject. Hence the facts in regard to the prior case must be fully set forth in the affidavit, or the proceedings must, by reference, be incorporated in the affidavit. **O'Malley v. O'Malley**, 528.

PRACTICE, C. P.—*continued.*3. *Affidavit of defense—Fraud—Insufficient averment.*

An affidavit of defense averring fraud is evasive and insufficient, if it does not aver facts showing the extent of the fraud or misrepresentations averred. **Placentino v. Young**, 561.

4. *Affidavit of defense—Trial—Questions not raised by affidavit of defense—Act of May 14, 1915, P. L. 483.*

Under the Act of May 14, 1915, P. L. 483, a defense not set forth in the affidavit of defense, cannot be raised at the trial. **Zoller Co. v. Hartford F. Ins. Co.**, 386.

5. *Charge—Judge expressing opinion—Jury cautioned.*

A judgment on a verdict will not be reversed because the trial judge expressed an opinion that plaintiff would not be able to earn as high a compensation after the accident as before, where the judge subsequently instructs the jury they are not to be influenced by any of his words but to take their own view of matters of fact. **Cramley v. Penna. R. R.**, 226.

6. *Foreign attachment—Dissolution—Appearance—Agreement of counsel.* **McLeod v. Hyman**, 582.7. *Judgment—Opening judgment—Trial without notice to counsel—Discretion—Act of 1915, P. L. 483.* **Thermo Water Lift Co. v. Air Tight Steel Tank Co.**, 91.8. *Judgment on pleadings—Ejectment—Act of June 7, 1915, P. L. 887—Trusts and trustees—Statute of frauds—Act of April 22, 1856, P. L. 532—Evidence.*

Under the Act of June 7, 1915, P. L. 887, after an action of ejectment is at issue, the court may grant a rule to show cause why judgment should not be entered upon the pleadings in favor of the defendant.

Such judgment will be entered, where plaintiffs have pleaded that defendant is a trustee under a parol trust, which cannot be proved because of the inhibition of the Act of April 22, 1856, P. L. 532. **Levy v. Seadler**, 366.

9. *Negligence—Affidavit of defense—Facts not denied admitted—Act of May 14, 1915, P. L. 483—Evidence—Damages—Contributory negligence.* **Gillespie v. Penna. Co.**, 393.10. *Opinions—General expressions—Maxim.*

General expressions in an opinion must always be limited to the facts of the case. If this were not so, every dictum would become a binding precedent.

Myer's Estate (No. 2), 232 Pa. 95, distinguished. **O'Malley v. O'Malley**, 528.

PRACTICE, C. P.—*continued.*

11. *Partnership—Parties—Statement of claim—Promissory notes—Presumption—Act of May 14, 1915, P. L. 483. Rhodes v. Terheyden, 397.*

12. *Statement—Foreign corporation—Registration—Doing business—Presumption of legality—Affidavit of defense.*

A foreign corporation may ordinarily maintain an action to enforce its contracts, within the State. It is restricted only when "doing business" within the meaning of the Pennsylvania registration law, and it has failed to register.

No presumption arises that a foreign corporation in bringing a suit in this State, is a wrongdoer, and has failed to perform its legal obligation of registering.

It need not in its statement of claim negative its violation of a penal statute.

Where, in such case, the statement of claim shows a Pennsylvania contract, and that the transaction involved interstate commerce, but does not show that the company plaintiff was "doing business" within the meaning of the registration laws, an affidavit of defense is insufficient which makes no proper averments to indicate the necessity of registration.

The mere averment that the corporation was doing business within the Commonwealth is not enough; facts must be set forth from which such conclusion can be drawn. **Meaker Galvanising Co. v. McInnes, 561.**

13. *Statement of claim—Insufficient statement—Remedy—Rule for more specific statement—Motion for non pros—Act of May 14, 1915, P. L. 483.*

If a statement of claim does not conform to the provisions of the Practice Act of May 14, 1915, P. L. 483, the defendant should move to strike it off, as provided by section 21 of the Act.

If a statement of claim does conform to the provisions of the Act of 1915, but is not sufficiently specific, the appropriate remedy is a rule for a more specific statement followed by a motion for a non pros, if the court makes the rule absolute and its order is not complied with.

The question to be decided under section 20 of the Act of 1915, is not whether a statement is so clear in both form and specification as to entitle plaintiff to proceed to trial without amending it, but whether upon the facts averred it shows, as a question of law, that plaintiff is not entitled to recover.

Where a doubt exists as to whether or not summary judgment should be entered, this should be resolved in favor of refusing to enter it. **Rhodes v. Terheyden, 397.**

PRACTICE, C. P.—*continued*.

14. *Trial—Evidence—Demonstration by another person's wounded hand.*

Refusal of the trial judge to permit the injured hand of a third person to be used before the jury, for purposes of demonstration, during the examination of a witness for defendant, is a matter within the control of the court below, and is not ground for reversal, where the appellate court is not convinced of an abuse of discretion. **Pinter v. Baker**, 541.

PRACTICE, EQUITY.

1. *Pleadings—Proofs—Decree—Damages.*

A decree in equity must conform to the case as made out by the pleadings as well as by the proofs, and hence damages cannot be awarded unless claimed in the pleadings and the fact and extent thereof shown by the evidence. **Reilly v. Magee**, 406.

PRESUMPTION.

1. *Marriage—Proof of—Cohabitation and reputation—Illicit intercourse—Claim of alleged widow of decedent—Husband and wife—Decedents' estates—Evidence—Findings of fact—Orphans' court—Appeal.* **Stevenson's Est.**, 291.

2. *Mines and mining—Surface support—Release—Damages—Covenants—Injury to water supply—Drilling well for water—Care of well—Negligence—Evidence—Equity maxim—Sic utere tuo.* **Householder v. Quemahoning Coal Co.**, 78.

3. *Municipalities—Controller—Refusal to countersign warrant—Ministerial capacity—Approval of bill for legal services—Mandamus—Return, sufficiency of averments—Specific remedy at law—Attorney-at-law—Contract to lowest bidder.* **Com. ex rel. v. Tice**, 447.

4. *Partnership—Practice, C. P.—Parties—Statement of claim—Promissory notes—Act of May 14, 1915, P. L. 483.* **Rhodes v. Terheyden**, 397.

5. *Statutes—Pleading—Fact.* **Putnam v. Ensign Oil Co.**, 301.

PRINCIPAL AND AGENT.

1. *Contracts—Payment—Accord and satisfaction—Agreement to receive back merchandise—Contemporaneous agreement—Evidence—Party dead—Agent—Authority—Accepting benefits—Estoppel—Hearsay—Harmless error—Delay—Act of May 22, 1887, P. L. 158.* **Danish Pride Milk Products Co. v. Marcus**, 340.

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PRINCIPAL AND AGENT—*continued.*

2. *Trusts and trustees—Agent taking property in his own name—Right to damages for injury to property by change of grade—Parol promise—Act of April 22, 1856, P. L. 532—Evidence—Memorandum in writing—Witness—Failure to object to evidence at trial—Waiver—Appeals. Christian Moerlein Brewing Co. v. Rusch, 181.*

PRINCIPAL AND SURETY.

1. *Contract—Sale—Payments—Inconsistent recoveries—Election of remedy. Star Drilling Machine Co. v. Richards, 383.*

PROMISSORY NOTES.

1. *Corporation as maker—Note held in due course—Accommodation notes—Defenses—Want of consideration—Note executed in violation of by-laws—Act of May 16, 1901, P. L. 194—Important suggested change in the law.*

In an action by the holder of a promissory note against the maker, a corporation, where the plaintiff avers in his statement that the notes were endorsed and delivered to his transferor before maturity, and that he is the holder thereof, and proves the execution of the notes and endorsements by intervening endorsees, the notes are properly admissible in evidence.

It is not necessary, in such case, for plaintiff to aver that his transferor took the notes in good faith for value, or that it was a holder thereof in due course, and that this should be proved, inasmuch as section 59 of the Negotiable Instruments Act of May 16, 1901, P. L. 201, provides that "every holder is deemed prima facie to be a holder in due course."

The holder in due course takes the instrument free from a defective title of prior parties, and free from the defenses available to prior parties among themselves.

A negotiable instrument gives substantial rights to one who derives his title through a holder in due course, provided the former has not been guilty of any fraud or illegal act.

If, however, it appears on the defense that "the title of any person who has negotiated the instrument was defective," the law raises a presumption in the maker's favor, and the burden is then shifted to the holder to show that he, or some one under whom he claims, was a holder in due course.

It is not necessary for defendant to show knowledge of the holder in addition to defective title, but a defense of non-liability will not be established solely by this evidence, for the jury must find the holder had knowledge of the defect, and this

PROMISSORY NOTES—continued.

it must do from the evidence so far submitted, or plaintiff may show he did not have such knowledge.

As against a holder in due course, a corporation maker of a promissory note cannot set up the defense that the note was given as an accommodation and without consideration. Section 59 of the Negotiable Instruments Act applies only to defective title, and not to such matter.

In an action against a corporation maker of a promissory note, proof that the note was issued by the officers of the company in violation of a by-law, is a complete defense, unless it appears that (a) the corporation received a benefit from the note; (b) that there was a previous course of dealing between the same parties; (c) a previous course of dealing generally under certain circumstances, or (d) that the entire management and control of the company was handed over to one individual.

The Pennsylvania rule criticized, and suggestion made that the legislature by appropriate action bring the law of this State into harmony with that of other states.

In an action on promissory notes of a corporation maker, plaintiff cannot be charged with notice of the illegality of the notes by proof of an equity proceeding by the receiver of his transferor, in which the legality of the notes was questioned, where it appears plaintiff was not a party to the proceeding, and had no actual notice of the defect in the notes through the proceeding.

In such case, the subsequent transfer of the notes by the receiver to plaintiff, alleged to have been without consideration, cannot be set up as a defense, as a breach of trust to which plaintiff was a party. **Putnam v. Ensign Oil Co.**, 301.

2. Endorsements—Priorities—Burden of proof.

Ordinarily the endorers on a note are liable in the order of their endorsements; he who asserts the contrary has the burden of proving the facts from which such a conclusion can properly be drawn. **Donnan v. Barnes**, 33.

3. Payment—Contract—Evidence—Prejudicial use of evidence—Cross-examination.

In an action on promissory notes given for the benefit of a corporation to whom plaintiff had made advances before the giving of the notes, it is reversible error to admit in evidence an agreement in writing between the parties to the notes, relating to a prior loan, in which the notes were not mentioned and which had no connection with them, and to permit the

PROMISSORY NOTES—*continued.*

use of the agreement in such a way as to prejudice the rights of plaintiff.

Cross-examination cannot be used so as to get before the jury incompetent and prejudicial facts not referred to in the direct-examination.

Where on appeal from judgment on verdict for defendant, the record shows that counsel for defendant set out to confuse, rather than to enlighten, the court and jury, and to prejudice the latter against plaintiff and his counsel, the verdict so won, will have little chance of standing on appeal, when any specific error appears on record which can fairly be accounted reversible.

Where an oral agreement is set up as a defense in an action on promissory notes, counsel for defendant should endeavor to get his witnesses to state facts from which the jury may draw conclusions, rather than merely their own conclusions as to what occurred when the alleged oral agreement was made. **Stybr v. Walter**, 202.

4. *Time of payment—Condition—Presentment—Reasonable time—Affidavit of defense—Insufficiency.*

Where a promissory note payable on demand is given with the condition that payment thereof shall not be demanded until the maker has satisfied his present creditors to an amount named, the obligation is absolute, and the only thing uncertain is the matter of time.

In an action on such note brought four years after its date, an affidavit of defense is insufficient which avers that the maker "has not been able to satisfy his creditors" to the amount named in the agreement, and therefore the note is not due and payable. **North Penn Bank v. Whetstone**, 519.

RAILROADS, see Negligence.

1. *Eminent domain—Branch—Public or private use—Burden of proof—Equity—Act of June 19, 1871, P. L. 1360—Bill by private person—Procedural questions—Action of directors—Notice to director general of railroads.*

In order to entitle a complainant in a bill in equity filed under the Act of June 19, 1871, P. L. 1360, to the equitable remedy which the statute provides, defendant, when properly challenged, must have failed to show a charter power to do the act complained of or it must be shown that something essential to the rightful exercise of the power sought to be asserted is lacking, or that some act has been committed which is so closely connected with defendant's right to exercise the power

RAILROADS—continued.

in question, as in effect to constitute a charter prohibition against its assertion under the facts in the particular case.

The burden of showing that a corporation is exercising franchises which it does not possess is on those alleging that it is attempting to do what it is not authorized to do.

Where a railroad company has a right to build an extension or a branch, it will be assumed, unless the contrary is plainly shown, that the railroad company's officials have performed their duty in good faith, when they declare a public necessity for an extension, or when they designate such extension as a branch.

The mere fact that some selfish interest may have inspired the plan for the construction of such section in no sense prevents that section from being classed as a "branch" road, or public use.

Wherever it appears from the attending circumstances that a section of road about to be constructed will in some direct way tend to contribute to the general public welfare, or the welfare of a considerable part of the public, such as the mining and marketing of the coal of the State, it cannot be said that it will not serve a public use.

Where a spur or siding from the main track of a railroad was originally built to serve a particular coal mine, the owners of such mine cannot maintain a bill in equity under the Act of 1871, to restrain the railroad company from condemning some of their land for the purpose of extending the tracks to serve another coal mine some distance beyond.

As such an extension will serve in part to get the coal supply of the State out of the mines, on its way to the consumer, to the great benefit of the public of Pennsylvania, the extension is one for public use, sufficient to justify the exercise of the right of eminent domain.

It is a rule that inquiry under the Act of 1871, is not permitted concerning the regularity of a condemnation from a mere procedural standpoint.

The complaint in a bill filed under the Act of 1871, to restrain the extension of a railroad, cannot allege that the extension was not authorized by the directors of the railroad company, or that the director general of railroads had not joined in the appropriation.

Such procedural defects must be determined in the condemnation proceedings proper. **Pioneer Coal Co. v. Cherry-tree, etc. R. R., 43.**

RAILROADS—continued.

2. *Negligence—Crossings—"Stop, look and listen"—Contributory negligence—Judgment on record—Act of April 20, 1911, P. L. 70. Sakall v. B. & O. R. R., 89.*

3. *Negligence—Damages—Excessive verdict—Abuse of discretion—Act of May 20, 1891, P. L. 101—Review. Stevenson v. Davis, 361.*

4. *Negligence—Interstate commerce—Federal Employers' Liability Act of April 22, 1908, 35 Stat. 65, ch. 149—Evidence—Brakeman—Defective appliance—Case for jury—Happening of accident—Res ipsa loquitur. Sullivan v. B. & O. R. R., 429.*

5. *Negligence—Joint use of tracks by two companies—Death—Case for jury—Contributory negligence—Anticipating negligence—Judgment n. o. v. Hastings v. South Shore R. R., 212.*

6. *Negligence—Master and servant—Assumption of risk—Knowledge of risk—Case for jury. Dollar Savings Fund & Trust Co. v. Penna. Co., 364.*

7. *Negligence—Master and servant—Defective coupler—Safety appliance—Federal acts—Contributory negligence—Federal Employers' Liability Act of 1908—Federal Safety Appliance Act. Gloeckner v. Penna. R. R., 312.*

8. *Negligence—Railroads—Master and servant—Safety appliance—Defect—Federal Act of March 21, 1893—Coupling cars—Contributory negligence—Case for jury—Verdict—Damages—Excessive verdict. Crumley v. Penna. R. R., 226.*

9. *Negligence—Speed—Signals—Warnings—Negative evidence of plaintiff—Positive evidence of defendant—Case for jury. Craft v. Hines, 499.*

10. *Workmen's compensation—Master and servant—Interstate commerce. McNeill v. Director Genl. of Railroads, 525.*

RECEIVERS.

1. *Sale of promissory notes—Formal order of sale.*

The mere fact that certain promissory notes are not included in a formal order to a receiver to sell the assets of a corporation, will not violate a subsequent sale of the notes, if the receiver had a general power to sell. *Putnam v. Esign Oil Co., 301.*

RES ADJUDICATA.

1. *Mines and mining—Lease—Covenant running with land—Covenant as to assignments—Consent of owner—Personal*

RES ADJUDICATA—continued.

covenant—Subsequent assignee. Lowry v. Atlantic Coal Co., 19.

SHERIFF'S SALE.

1. *Equity—Equity jurisdiction—Remedy at law—Cloud on title—Demurring and answering at same time—Words and phrases—Sheriff's inquisition—Satisfaction of debt in seven years—Invalid sheriff's sale—Ejectment bill. Onorato v. Carlini, 489.*

2. *Execution — Distribution — Subrogation — Judgment—Maxims—In fictions juris, etc. Donnan v. Barnes, 33.*

STOCK.

1. *Contract—Sale of land—Conditions—Sale of stock of corporation—Costs divided. Munroe v. Reliance Land Co., 464.*

SPECIFIC PERFORMANCE.

1. *Equity—Decree matter of grace—Discretion of court—Findings of fact—Trust relation—Fraud—Evidence. Volk v. Volk, 378.*

2. *Equity—Time—Essence of contract—Waiver—Agreement as to new time of settlement—Tender. Piacentino v. Young, 556.*

3. *Vendor and vendee—Sale of real estate—Tender of purchase money—Time when essence of contract—Consideration—Sale of wife's real estate—Husband's participation in sale—Statute of fraud—Quitclaim deed. Shrat v. Haselton, 113.*

STATEMENT OF CLAIM.

1. *Evidence—Contradiction of witness by physical facts—Case for jury—Mines and mining—Unlawful mining of coal—Damages—Act of May 8, 1876, P. L. 142. Fuher v. Westmoreland Coal Co., 14.*

2. *Partnership—Practice, C. P.—Parties—Promissory notes—Presumption—Act of May 14, 1915, P. L. 483. Rhodes v. Terheyden, 397.*

3. *Practice, C. P.—Insufficient statement—Remedy—Rule for more specific performance—Motion for non pros—Act of May 14, 1915, P. L. 483. Rhodes v. Terheyden, 397.*

STATUTES.

1. *Construction—Views of framers of laws—History of statute—General revision of laws.*

STATUTES—*continued*.

While courts may not resort to views expressed by those who either draft or enact laws, for the purpose of determining the meaning of the words employed therein, yet, in order to get at the old law, the mischief and the remedy, and properly to understand and construe a statute embodying the latter, the history of the enactment may always be considered.

When a statute under consideration is a general revision, the law, as therein written, will be deemed to be the same as it stood prior to the revision unless the courts find from the statute itself, or its history, a clear intention to change it. *Miles's Est.*, 329.

2. *Pleading—Presumption—Fact.*

It is not necessary to plead a presumption of fact that arises from a given fact under a statute. When the fact is averred the presumption attaches by virtue of the statute. *Putnam v. Esigna Oil Co.*, 301.

STREET RAILWAYS.

1. *Negligence—License on car—Presumption from accident as to passengers—Work car—Wilful acts.* *Bally v. Pittsburgh Rys.*, 178.

SALE.

1. *Church law—Inactive or extinct church—Appointment of trustee—Findings of fact—Appeal—Acts of June 5, 1913, P. L. 435; April 18, 1919, P. L. 72; May 17, 1921, P. L. 861—Cemeteries—Burial grounds.* *Mt. Calvary Methodist Protestant Church*, 453.

2. *Contract—Evidence—Parol evidence—Capacity of cars.* *Duff v. Hamlin*, 245.

3. *Contracts—Nonperformance—Difficulty of performance—Limited quantity in market—Damages—Measure of damages—Sales Act of May 19, 1915, P. L. 543.* *Iron Trade Products Co. v. Wilkoff Co.*, 172.

4. *Contract—Payments—Inconsistent recoveries—Election of remedy—Principal and surety.* *Star Drilling Machine Co. v. Richards*, 383.

5. *Foreign attachment—Affidavit of cause of action—Contract.* *McLeod v. Hyman*, 582.

6. *Practice, C. P.—Affidavit of defense—Contradictory or equivocal averment.* *Iron Trade Products Co. v. Wilkoff*, 172.

7. *Vendor and vendee—Sale of real estate—Specific performance—Tender of purchase money—Statute of frauds.* *Shrut v. Huselton*, 113.

TAXATION.

1. Personal property tax—Corporations—Tax on capital stock—Foreign corporations—Holding companies—Registration—Doing business—Words and phrases—Tangible assets—Assessment by auditor general—Act of June 17, 1913, P. L. 507, and July 15, 1919, P. L. 948—Failure to make return—Penalty—Remission.

The shares of stock of a foreign corporation owned by a resident of Pennsylvania is subject to the personal property tax for county purposes under the Act of June 17, 1913, P. L. 507, where it appears that although the corporation is registered to do business in the State, it has no tangible property there subject to the capital stock tax under the Act of July 15, 1919, P. L. 948.

In such case it is immaterial that the corporation owns the entire capital stock of another corporation which has extensive holdings of property in this State, and is engaged extensively in business herein; the shares of stock of the subsidiary company are not tangible assets.

Nor is it material that the auditor general has assessed and such foreign corporation has paid the capital stock tax under the Act of July 15, 1919, P. L. 948, if it appears that the corporation was, in fact, not liable for such tax. The auditor general's report in such case is not conclusive upon the county authorities.

Value, for purposes of capital stock taxation, comes through property, and if the corporation is doing business here, with no property or capital located or used in the Commonwealth assessable for state purposes, its stock has no value upon which a capital stock tax may be based.

Registration in the nature of a license, or a right to do business, has no taxable value.

Acts in conformity to, and in furtherance of, the sole business purposes of a going concern, represent "doing business," but such acts alone do not constitute "doing business in and liable to taxation," within the meaning of the statute.

To justify the imposition of a tax without a statute plainly warranting it, it is not enough to show that the absence of a tax works an injustice in permitting many persons to escape taxation.

A personal property tax is a personal levy against resident holders, computed on the value of shares of stock owned by them, not taxable for state purposes or exempt under state laws.

TAXATION—continued.

Corporate tax is a levy by the State against the capital stock as its value is computed from the assets, less such as are non-taxable, exempt, or on which a state tax has been paid.

A corporation does not lose its corporate identity when its stock is all owned by another corporation.

Where a holding company is a shareholder of a subsidiary company, it stands in the same relation to that company as any individual owner of stock, but the legal relations of the two companies, qua companies, are entirely different, as must be the rights of their stockholders.

Where a citizen fails to make a return of personal property through an honest misconception of the law relative to the taxing statutes, the courts have no power to relieve him from the penalty of 50 per cent. for the failure, but the board of revision should do so. **Callery's Appeal**, 255.

2. Personal property tax—Corporations—Foreign corporation—Tangible property—Registration—Doing business—Acts of June 17, 1913, P. L. 507, and July 15, 1919, P. L. 948—Failure to make return.

Shares of stock of a foreign corporation owned by a resident of Pennsylvania are subject to the personal property tax for county purposes under the Act of June 17, 1913, P. L. 507, where it appears that, although the corporation is registered to do business in the State, it has no tangible property in the State subject to the capital stock tax under the Act of July 15, 1919, P. L. 948.

The auditor general's assessment of a tax on the capital stock of such corporation is not conclusive upon the county authorities.

Registration and authorization to do business are not sufficient to make a corporation liable to taxation on its capital stock.

In determining whether a corporation is liable to a capital stock tax, patent rights or assignments thereof, cannot be considered. They are an intangible asset created through Federal laws.

Nor can the taxing authorities consider United States bonds, stock of domestic or foreign corporations, cash in bank, mortgages and other intangible assets that are referable to the domicile of the corporation where such assets have their situs or ownership.

Where, on an appeal, from a personal tax settlement, there is nothing on the record to show that a foreign railroad corporation has tangible property in this State, so as to render it

TAXATION.—continued.

liable to tax on its capital stock, the county authorities may levy the personal property tax on its stock in the hands of a resident taxpayer.

If such company is doing business in Pennsylvania, it is liable to the State for a tax on its bonds, but if it is not doing business, the county is the proper body to receive the tax.

Where a citizen acting in good faith fails to make a tax return, and takes an appeal from a personal tax settlement made against him, the board of revision should relieve him from the penalty imposed by the act. *McMullin's Est.*, 284.

TIMBER.

1. *Unlawful cutting—Trespass—Possession—Adverse possession—Residence—Cultivation, etc.*

Plaintiff, in an action to recover damages for the unlawful cutting of trees, must not only show title or ownership of the land, but also possession or right to immediate possession at the time of the trespass.

While a warrant for unimproved lands gives to the owner such constructive possession as will enable him to maintain trespass, it cannot be effective against one who has an actual adverse possession of the land.

Actual possession may be by residence without cultivation or by inclosure and cultivation without residence.

Where, in an action for unlawful cutting of timber on unimproved land, plaintiff claims by a record title, but does not aver or show possession and the defendant shows actual possession for more than forty years, plaintiff cannot maintain the action, but must first establish title by an action of ejectment. *Kossell v. Rhoades*, 76.

TRADE-MARK.

1. *Unfair competition—Equity—Injunction—Pleading—Demurrer.*

Anything done by a rival in the same business, by imitation or otherwise, designed or calculated to mislead the public in the belief that, in buying the product offered by him for sale, they were buying the product of another manufacturer, is unfair competition and in fraud of such other's rights, and will afford just ground for equitable interference.

A demurrer to a bill in equity should not be sustained, where the bill avers that plaintiff was the owner of a trademark on underwear, that defendant in numerous instances

TRADE-MARK—continued.

when asked by customers for plaintiff's brand of underwear, had passed off other makes, and that these acts were for the sole and deliberate purpose to deceive and defraud the public as well as to cheat the complainant. **B. V. D. Co. v. Kaufmann & Bear Co.**, 240.

TRESPASS.

1. *Timber—Unlawful cutting—Possession—Adverse possession—Residence—Cultivation, etc.* **Kessell v. Rhoades**, 75.

TRIAL.

1. *Appeals—Excessive verdict—New trial—Discretion of court—Abuse.* **Sullivan v. B. & O. R. R.**, 429.

2. *Jury—Attorneys-at-law—Retention of client's money—Breach of fidelity to client—Disbarment—Acts of April 14, 1834, P. L. 333.* **Balogh v. Jackson**, 482.

TRUST AND TRUSTEES.

1. *Equity—Accounting for profits—Purchase of coal lands—Joint owners—One party butting out the other—Signature to paper—Modification of paper—Notice—Constructive notice—Trustee ex maleficio.* **Williamson v. Dawson**, 370.

2. *Executors and administrators — Duties — Liabilities.* **Wood's Est.**, 8.

3. *Practice, C. P.—Judgment on pleadings—Ejectment—Act of June 7, 1915, P. L. 387—Trusts and trustees—Statute of frauds—Act of April 22, 1856, P. L. 532—Evidence.* **Levy v. Seadler**, 366.

4. *Agent taking property in his own name—Right to damages for injury to property by change of grade—Parol promise—Act of April 22, 1856, P. L. 532—Evidence—Memorandum in writing—Witness—Failure to object to evidence at trial—Waiver—Appeals.*

The property of a principal does not necessarily become that of the agent, because the latter is authorized to and does receive it in his own name.

It is competent to show a writing was executed on the faith of a parol promise, although the latter may change the terms of the former.

A trust as to personal property may always be established by parol.

In an action to recover money received by defendant as change of grade damages to a leasehold standing in his name,

TRUSTS AND TRUSTEES—*continued.*

where plaintiff claims that the leasehold was held in trust for them, judgment for plaintiff will be affirmed, where letters of defendant clearly admitted the existence of the trust, and the evidence shows that the damages had been formally assigned to defendant without consideration, in order to assist in their collection.

5. In such case, as plaintiff was not trying to enforce a trust as to realty, the five years' limitation provided by section 6 of the Act of April 22, 1856, P. L. 533, has no application.

Nor is it necessary, under the circumstances of the case, to decide whether a leasehold estate falls within the term of "lands, tenements or hereditaments" in section 4 of the Act of 1856, for, if so, the trust was sufficiently manifested or acknowledged in writing signed by defendant to satisfy the statute.

Where a witness has no present recollection of a past event, even when aided by a memorandum made at the time, the memorandum itself may be offered in evidence, on proof by the witness of his knowledge of its accuracy when made, and that it was made when the transaction was fresh in his mind.

The place to question the authenticity of written evidence, is in the trial court, where it can be met, and not on appeal.
Christian Moerlein B. Co. v. Rusch, 181.

5. *Will—Changes therein—Oral instructions to executors—Interest in property—Equity.* **Porter v. Wolf**, 93.

6. *Wills—Perpetuity—Illegal devise—Intention.* **Lilley's Est.**, 143.

VENDOR AND VENDEE, see Equity.

1. *Deed—Exchange of real estate—Reconveyance if settlement fails—Equity—Cloud on title.*

Where, pending consummation of an agreement for an exchange of real estate, the deed from one of the parties is executed and recorded, it is the duty of the other to reconvey the property, if the settlement fails; but he is not required to do this until the former presents a deed of reconveyance.

An agreement of exchange of properties, operates to vest in each of the respective grantees an equitable title to the property he is to receive, and, hence, if the exchange falls through and the agreement has been recorded, equity has jurisdiction to remove the cloud upon the title thus created.
Reilly v. Magee, 406.

WAIVER.

1. *Equity—Specific performance—Time—Essence of contract—Agreement as to new time of settlement—Tender. Piacentino v. Young, 556.*

2. *Insurance—Fire insurance—Prohibition of other insurance—Estoppel—Authority of agent. Russell v. Farmers Mut. F. Ins. Co., 1.*

3. *Insurance—Livestock insurance—Loss of hogs by carrier—Proofs of loss—Evidence—Stockyard books—Best evidence—Identification of handwriting—Acceptance of limited bill of lading. Wm. Zeller Co. v. Hartford F. Ins. Co., 386.*

4. *Negligence—Statement—Evidence—Allegata and probata—Amendment—Surprise—Continuance—Appeal—Proximate cause—Fire—Oil on river—Spreading fire by wind—Intervening independent agency—Things to be naturally anticipated—Act of God or vis inertia. Pittsburgh F. & L. Co. v. Dravo Contracting Co., 118.*

5. *Trusts and trustees—Principal and agent—Agent taking property in his own name—Right to damages for injury to property by change of grade—Parol promise—Act of April 22, 1856, P. L. 532—Evidence—Memorandum in writing—Witness—Failure to object to evidence at trial—Appeals. Christian Moerlein Brewing Co. v. Busch, 181.*

WIDOW.

1. *Workmen's compensation—Injury—Death—Reduction of payments—Act of June 26, 1919, P. L. 642. Napp v. Estep Bros. Coal M. Co., 159.*

WILLS.

1. *Changes therein—Oral instructions to executors—Trusts and trustees—Interest in property—Equity.*

An oral promise made by executors to testator to carry out certain changes which he desired to make in his will, and which he could not make by a new will or codicil because of his weakened physical condition, is not enforceable as a trust impressed upon testator's property, where the will gives the executors no interest therein. *Porter v. Wolf, 93.*

2. *Construction—Agreement of legatees as to construction of will—Widow's election—Estoppel—Married women—Control of personal property—Husband and wife—Act of June 8, 1893, P. L. 344.*

Where a testator, leaving to survive him a widow and three daughters, directs that his estate shall be kept intact at least

WILLS—continued.

for ten years, unless his wife should remarry, in which event the estate should be settled, and further directs that any moneys given to his daughters or set aside for them should not be charged up against them in settling the estate, this to be in place of insurance, which amounts "they shall share and share alike in case of either one of the three daughters demise then her share shall revert to the other two and so on to the last one left living of the three," the survivorship relates to the expiration of the period of ten years and refers to the residuary estate, and not to the insurance fund, which testator did not intend to form a part of his estate.

If, in such case, the words relative to the death of the daughters be applied to the insurance money, no provision is made in the will for either the division of the estate, or its vesting; and the testator must be held to have died intestate as to all the rest of his property, constituting the larger part of his possessions. A construction of the will which favors intestacy is to be avoided, if possible.

The widow's election to take against the will, with full knowledge of the distribution of the insurance fund among her daughters, estops her from making any claim to that fund.

Where the three daughters, one of whom is married, executed an agreement, without the joinder of the married one's husband, that all of the estate of their father, with the exception of the insurance funds, already distributed, should remain intact, for the period of ten years from testator's death, the daughters to receive the income therefrom and to "hold the estate as tenants in common with the right of survivorship," the husband of the married daughter, after the death of his wife, can claim no interest in the personal estate through his wife.

Under the Act of June 8, 1893, P. L. 344, the married daughter had the full right to dispose of her personal property without her husband's consent or joinder. **Fitzgibbon's Est.**, 345.

3. Construction—Devise—Fee-simple estate—Life estate with power of alienation.

Where testator devises his real estate to his two daughters naming them, the survivor to take the entire estate if one shall precede the other in death, and then directs that, after the death of both daughters, the real estate, "if still owned by either of them," shall go to his three sons, the daughters have a right to sell the real estate and convey a good and market-

WILLS—*continued.*

able title to it; and this is the case whether they take a fee or a life estate with power of alienation. **Grundler v. Chmielinska**, 197.

4. *Construction—Devise to wife—Life estate—Remainder—Absence of gift over—When intention not to give fee.*

Where a testator devises real estate to his wife "for her use and maintenance and that of my minor children," gives her a full power of sale, and finally directs that all of his property after payment of legacies shall revert to his wife as executrix "according to the provisions mentioned and set forth in this my last will and testament," the wife takes a life estate, and if any real estate remains unsold at the death of the wife the children take it in remainder under the testator's will.

In such case the power to sell was not repugnant to the creation of a life estate in the wife.

The absence of a gift over on the death of the wife, does not, under the particular wording of the will, vest a fee in the wife.

Though the absence of a gift over is some indication of a purpose to give to the first taker an estate in fee, yet the will as a whole may disclose a contrary intention. **McCullough's Est.**, 509.

5. *Construction—Devise—Fee cut down by subsequent words—Sale of real estate—Distribution of proceeds—Limitation of devise—Trust—Precatory and mandatory words—"Desire"—"Wish"—Words and phrases.*

Such words as "desire" or "wish," generally precatory, when used in connection with an act to be done by some person named by testator, are mandatory when expressive of the intent of testator to be carried out without the intervention of another's will.

Where testatrix gives her real estate to her husband, except one parcel, and later in the will directs, "I also desire, should my husband wish to dispose of all the remainder of the real estate, in my name, he may do so with the provision that my daughter. . . . receives two-thirds of the proceeds of said sale," the daughter is entitled to two-thirds of the proceeds of whatever real estate her father sells. **Croft v. Chelton T. Co.**, 514.

6. *Construction—Estate in fee-simple—Power to convey in fee—Devise to son.*

Where a testator devises real estate to his son, and if the son dies unmarried, then over, but if the son is married then to his children, followed by a provision for the son's widow if

WILLS—continued.

the son has no children, at his death, and a final direction that on the widow's remarriage "then the remaining property he [the son] has not sold shall go back to" testator's remaining children, the son takes an estate in fee-simple, or at least the power to sell it in fee.

In such case the provision "if my son" dies married or not married is to be deemed to refer to death in the lifetime of testator. *Shomhorst v. Jacob*, 223.

7. Decedents' estates—Deficiency of personal assets—Real estate—Conversion—Payment of insurance—Creditors—Failure to establish lien—Conversion—Necessity.

Where there is a failure of personal assets with which to pay the debts of a decedent, creditors who have failed to establish a lien on the real estate cannot participate in the distribution of the proceeds of a sale thereof, in the absence of conversion by the will, although their claims have been approved at the audit of the executor's account.

Where a testatrix by her will gave no positive direction to sell real estate, but leaves personal assets insufficient to pay debts and legacies, and directs that her real estate shall be held for memorial purposes, there is no conversion of the real estate by necessity.

The necessity must have been contemplated by testatrix, in order that the scheme of the will could be carried out, and not be merely a necessity as a matter of fact arising out of the actual circumstances of the estate after death. *Reel's Est.*, 135.

8. Perpetuity—Illegal devise—Intention—Trusts and trustees.

A perpetuity is any limitation or condition which may take away or suspend the absolute power of alienation for a period beyond life or lives in being and twenty-one years thereafter. If there is any possibility that a violation of this rule may happen, the devise is void.

The rule is to be applied after testator's intentions are discovered; its object is to defeat a manifest intention which is contrary to a well-recognized policy of the law.

The rule has to do with future estates, which, by possibility, may not become vested within the time prescribed by law; it applies only to future estates which are contingent, and has no application to vested estates.

If an absolute term of years is specified by the testator, and no anterior term for a life in being is referred to, such abso-

WILLS—continued.

lute term cannot be longer than twenty-one years from testator's death. The rule applies to both equitable and legal estates.

Where a testator creates an active trust in two nephews, named as executors, and their successors, to collect, invest, accumulate, conserve and divide the property at the end of ninety-nine years, and provides that no portion of the estate, either principal or income, shall be parted with during that period, and that final distribution shall be made to the heirs of the two nephews living at that time, the gift is contingent, as there can be no vesting until the identity of the persons to take is determined, and the devise violates the rule against perpetuities.

The prior estate held by the executors falls with the gift, and a resulting trust arises in the heirs at law and next of kin of the testator.

Where the provisions creating the particular estate in trust are inseparable and dependent parts of the testator's main scheme to tie up his residuary estate in the ultimate gift, and thereby prevent the vesting until a date too remote under the rule, such provisions, including all the agencies or means designed to accomplish the desired and forbidden end, are void. *Lilley's Est.*, 143.

8. *Perpetuities—Illegal devise—Trusts and trustees—Mining coal—Royalty agreement—Inseparable illegal purpose—Option—Time for acceptance necessary.*

Where a testator owning a controlling interest in the shares of a coal company and an absolute estate in a large acreage of coal, gives such estate to trustees, with active duties, to hold for ninety-nine years, and the terms of the will show an obvious purpose to violate the rule against perpetuities, a direction in the will that the "coal may be opened up and worked on a royalty to suit the company" is null and void.

As such provision was the chief instrument to accomplish the illegal purpose of the will and was inseparably connected with such purpose, it fails with the illegal trust created by the will.

Even if it should be considered as separable from the will, and for the benefit of the corporation, it fails, because (1) it is not a devise upon a condition subsequent; (2) it is not a gift; (3) it could not become effective until the trustees entered into a contract with the company, and they had no power

WILLS—continued.

to do so; and (4) it was not an option, as no time for acceptance was stated. *Lilley's Est.*, 143.

9. *Probate—Codicil—Proof of contents—Evidence—Act of June 7, 1917, P. L. 403.*

Proof of a lost will or codicil is made out only by proof, by two witnesses, of execution and of contents, each of whom must separately depose to all the facts necessary to complete the chain of evidence, so that no link in it may depend on the credibility of one.

The burden of proving a lost will or codicil is on the proponent, and in this case the proof of the execution of a codicil or will was met, but proof of its contents failed to meet the requirements of the act. *Lawman's Est.*, 237.

WITNESS.

1. *Evidence—Competency of witness—Death. Wood's Est.*, 8.

WORDS AND PHRASES.

1. *Equity — Equity jurisdiction—Remedy-at-law—Equity practice—Cloud on title—Demurring and answering at same time—Sheriff's inquisition—Satisfaction of debt in seven years—Invalid sheriff's sale—Ejectment bill. Onorate v. Carlini*, 489.

2. *Judgment—Opening judgment—Lis pendens—Church trustees—Judgment for repairs—Equity. Bungar v. St. Michael's Greek Catholic Church*, 402.

3. *Taxation—Personal property tax—Corporations—Tax on capital stock—Foreign corporations—Holding companies—Registration—Doing business—Tangible assets—Assessment by auditor general—Act of June 17, 1913, P. L. 507 and July 15, 1919, P. L. 948—Failure to make return—Penalty—Remission. Callery's App.*, 255.

4. *Wills—Construction—Devise—Fee cut down to substantive words—Sale of real estate—Distribution of proceeds—Limitation of devise—Trust—Precatory and mandatory words—"Desire"—"Wish." Croft v. Chelton Trust Co.*, 514.

WORKMEN'S COMPENSATION.

1. *Course of employment—Regular course of business—Casual employment—Acts of June 2, 1915, P. L. 736, and June 26, 1919, P. L. 642—Review on appeal—Facts and law.*

WORKMEN'S COMPENSATION—continued.

A person who enlists himself in the army of industrial and business workers must, in order to entitle himself to the benefits of the Workmen's Compensation Act, undertake more than a mere casual or incidental job; he must enter the ranks of those employed in the regular course of business of his particular employer, and, when such a worker claims compensation, it must appear that he was injured in the course of his employment.

Since the Act of June 26, 1919, P. L. 642, amending the Workmen's Compensation Act of June 2, 1915, P. L. 736, the appellate court has the entire record before it, but its revisory powers are limited to a determination of the question whether there is any evidence to support the findings, and whether the law has been properly applied to them.

The determination of the applicability of the provision of the act excluding those whose employment is "casual in character and not in the regular course of the business of the employer," depends, under any given state of facts, upon the interpretation or construction of the act, and is a question of law.

In a proceeding for compensation for damages for death of claimant's husband, the question whether there is evidence to sustain findings that deceased was, or was not, doing certain things when injured, is one of law, which may be reviewed to the extent only of deciding whether there is such evidence in the record; but if the evidence appears, the findings thereon are of fact, and are not subject to review.

Whether, on the facts found, the deceased was killed in course of his employment, and also whether the employment was "casual in character and not in the regular course of the business of the employer" within the meaning of the act, are questions of law, and, as such, open to review.

In order to come within the act, an injury to an employee need not arise out of his employment; all that is necessary is that it occur in the course of that employment. The fact that the employee may have been guilty of contributory negligence is immaterial.

The provision in article III, section 301, of the Act of June 2, 1915, P. L. 738-9, is broad enough to include every injury received on the premises of the employer, during the hours of employment, so long as the nature of the employment demands the employee's presence there, regardless of whether his presence at the particular place where the injury occurred is ac-

WORKMEN'S COMPENSATION—continued.

tually required, if there is nothing to prove a virtual abandonment of the course of employment by the injured person, or that, at the time of the accident, he was engaged in something wholly foreign thereto.

In order to bring a workman within the exception of those employees not covered by the statute, it must appear that the employment was both casual in character and outside the regular course of the business of the employer.

The casual employment of one for the performance of an odd job, may occur in conducting a business and still not be within its regular course.

The words "regular course" refer to the normal operations which regularly constitute the business in question, excluding incidental or occasional operations arising out of the transaction of that business, such as, now and again, repair of the premises or appliances or machinery used therein.

A claim by a wife for compensation for the death of her husband will be dismissed on the ground that, while deceased was killed in the course of his employment, such employment was casual and not in the regular course of business of the employer, where it appears that deceased, a skilled mechanic in business for himself, was employed by an oil company to repair an engine, at the deceased's customary charge per hour; that during the progress of the work it was found necessary to take the cylinder of the engine to deceased's shop for re-boring; that after waiting a few minutes for defendant's employee to get ready to transport him, deceased, for some undisclosed reason, stepped into an adjoining pump house on defendant's premises, was caught in the machinery and killed.

Such ruling does not exclude from the benefit of the compensation law all those employed at unit, sometimes called "contract," prices, based on quantity of work done, because in many such cases the duties performed are neither casual nor out of the regular course of the business of the employer. **Callihan v. Montgomery**, 56.

2. Death—Tuberculosis—Injury as contributing cause—Opinion of medical experts—Evidence—Hypothetical question.

An award for the death of an employee from tuberculosis, seven months after his injury, will be sustained where medical experts testify that the shock of the accident and consequent lowered vitality rendered the injured man particularly subject to the quick development of the disease from which he

WORKMEN'S COMPENSATION—continued.

died, and that such development was, in all probability, due to the assigned cause.

In such case there is no merit in a complaint concerning the alleged incompetency of the medical testimony, where the doctors, some of whom attended the deceased, based their conclusions on a reading of the evidence in the case, and each stated the facts they assumed to be true, and which formed the basis of their conclusion, as much as though these facts had been put to them in the form of a hypothetical question.

Kelly v. Watson Coal Co., 39.

3. *Death on houseboat—Jurisdiction—Admiralty—Navigable waters—Landing—Findings of compensation board—Workmen's Compensation Act.*

The Pennsylvania Workmen's Compensation Act applies to a case where a workman is killed in the course of his employment in a houseboat on which he lives permanently, attached to a landing by ropes, and belonging to a corporation operating boats on navigable rivers, where it appears that the houseboat was not moved about, that the landing was its fixed location, and that it was considered part of the landing.

In such case, if the compensation board does not find that the houseboat was in the water, or between high and low watermark, there is sufficient to establish jurisdiction under the Pennsylvania law, and not under admiralty law. **Lawton v. Diamond C. & C. Co.**, 74.

4. *Exceptions—Fact and law—Remitting record.*

The rule that when the common pleas sustains an exception to an award and reverses the action of the board, it must remit the record to that body for further hearing and determination, concerns only exceptions to findings of fact. **Callihan v. Montgomery**, 56.

5. *Injury—Death—Reduction of payments—Widow—Act of June 26, 1919, section 306, P. L. 642, 646.*

Under the Act of June 26, 1919, P. L. 642, 646, where a workman, after having received weekly compensation for a number of weeks, dies as a result of his injuries, the only period which should be reduced by reason of payments to the deceased in his lifetime, is the period of three hundred weeks during which compensation is payable to his widow.

The act does not provide for a double deduction from the widow and children. **Nupp v. Estep Bros. C. M. Co.**, 159.

6. *Minors—Agreement.*

WORKMEN'S COMPENSATION—*continued.*

A party who has voluntarily agreed to accept from defendant compensation for injuries, calculated in a particular way, and has received and retained the money paid in accordance therewith, cannot thereafter prosecute a suit to recover additional compensation for the same injuries.

Having agreed to and received compensation in the manner provided by the Workmen's Compensation Act, an injured party waives all right to recover by any other method.

Though a minor cannot be compelled to accept compensation under the Workmen's Compensation Act, if he was injured while engaged in work in express violation of a statute, he may nevertheless voluntarily do so, and if he does he cannot afterwards maintain an action of trespass to recover damages for the same injuries.

A minor who has sustained injuries in the course of his employment, may agree to receive from his employer the compensation provided by the Workmen's Compensation Act, and if he does so with the approval of the board, he and his parents will be bound thereby, unless the agreement is modified or set aside by a supplemental agreement approved by the board, or because it is proved to the satisfaction of the board that the agreement was procured by fraud, coercion or other improper conduct of the employer.

Lincoln v. National Tube Co., 268 Pa. 504, distinguished.
DeLaney v. Phila. C. & I. Co., 578.

7. Modification of order—Reinstatement of original compensation order.

Where, following a compensation agreement based on total disability, an order is made terminating such agreement but directing further compensation to be paid as partial disability, "same to be determined after complainant has returned to work and his loss of earning power has been established," the workmen's compensation board has jurisdiction at any time during the period of 500 weeks to reinstate the original compensation agreement for total disability if such disability is established.

In such case, it is immaterial that after claimant had returned to work the board had refused the petitions filed by him for review and modification, before the final one was filed on which reinstatement was made.

A proceeding under the Workmen's Compensation Act is not "litigation" to which established rules and principles of common law practice are applicable.

WORKMEN'S COMPENSATION—*continued.*

Those appointed to administer the Compensation Act are vested with authority to act for the State in the capacity of *parens patriæ*. **Gairt v. Curry Coal Mining Co.**, 494.

8. *Railroads—Master and servant—Interstate commerce.*

Where a train has any interstate cars in it, it must be treated as an interstate train, in determining whether or not the carrier is liable for an accident occurring in its operation. Interstate commerce is directly affected and the rules applicable thereto apply when a train containing interstate cars is being cut, so that a new car may be added at such a place in the train as to facilitate its delivery and the delivery of the other cars, when they reach their destination.

The movement of a train containing interstate cars, to a point where it is to be broken up into a number of separate trains, is a movement in interstate commerce.

Not decided whether or not an employee engaged in interstate commerce can obtain relief under the Workmen's Compensation Act, if he is injured by another carrier than his employer.

Murray v. Pgh., C., C. & St. L. R. R. Co., 263 Pa. 398, distinguished. **McVeill v. Director Genl. of Railroads**, 525.

9. *Widow—Remarriage of widow—Compensation to children.*

Under the Workmen's Compensation Act of June 26, 1919, section 307, par. 4, P. L. 642, amending the Act of June 2, 1915, P. L. 736, where a widow remarries after having received compensation for a number of weeks, she is entitled to weekly compensation for one-third of the remaining 300 weeks, but not exceeding 100 weeks.

The children's compensation in such case, does not commence at the date of the widow's remarriage, but is postponed until after she has ceased to receive compensation. **Ferdisko v. Trimble & Sons Co.**, 125.

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